United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1900.

No. 995. **20**

THE NATIONAL BANK OF THE REPUBLIC AND JOHN B. LARNER, APPELLANTS,

vs.

THE UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 26, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1900.

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THE NATIONAL BANK OF THE REPUBLIC AND JOHN B. LARNER, APPELLANTS,

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 28, 1900.

In the Court of Appeals of the District of Columbia.

THE NATIONAL BANK OF THE REPUBLIC ET AL., Appellants,
vs.
THE UNITED SECURITY LIFE INSURANCE AND TRUST Company of Pa.
No. 995.

a Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE and Trust Company of Philadelphia
vs.
JOHN J. CUDMORE ET AL.
No. 19177. Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed Mar. 24, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

THE UNITED SECURITY LIFE INSURANCE AND Trust Company of Pennsylvania, Complainant,
vs.
JOHN J. CUDMORE, DANIEL B. CLARKE, THE National Bank of the Republic of Washington; Ellis H. Roberts, Treasurer of the United States and *ex Officio* Commissioner of the Sinking Fund of the District of Columbia.
Equity. No. 19177.

To the supreme court of the District of Columbia, holding special term in equity:

The bill of complaint of the United Security Life Insurance and Trust Company of Pennsylvania respectfully represents:

1. That it is a corporation duly incorporated under the laws of

the State of Pennsylvania and having its habitat in the city of Philadelphia, in said State.

2. That the defendant John J. Cudmore is a resident of the District of Columbia and is sued in his own right; that the defendant Daniel B. Clarke is a resident of the said District and is sued as the attorney-in-fact of said Cudmore; that the defendant The National Bank of the Republic, a corporation formerly doing business
2 in the city of Washington, District aforesaid, and having its habitat therein, is sued as the beneficiary under a certain power of attorney from the said Cudmore to the said Clarke; that the defendant Ellis H. Roberts, the Treasurer of the United States, is sued as commissioner *ex officio* of the sinking fund of the District of Columbia.

3. That heretofore, to wit, on the fourteenth day of August, A. D. 1890, the defendant John J. Cudmore entered into a contract with the District of Columbia for the construction of certain sewers, &c., the number of said contract being 1270; that under said contract the defendant The Treasurer of the United States, as commissioner aforesaid, was authorized to and did retain of the amount of the contract price to be paid to the said Cudmore the sum of $2,920.64, as provided by section 5 of the act of June 11, 1878. A copy of said contract is filed herewith and marked U. S. L. I. & T. Co. Exhibit No. 1, and it is prayed that the same may be read and considered as a part of this bill of complaint. The "retain" provided for by said contract is shown in the annual report of said treasurer for the year 1893, a copy of which is filed herewith and marked U. S. L. I. & T. Co. Exhibit No. 2, and it is prayed that the same be considered as part of this bill of complaint.

4. That thereafter, to wit, in the month of September, A. D. 1894, the said "retain" of $2,920.64, held by the said treasurer as commissioner of the sinking fund of the District of Columbia aforesaid, was offered for sale by said Cudmore and was purchased by your complainant, to whom it was assigned by said Cudmore in good faith and without notice that there was any other claim
3 thereto, for the sum of two thousand dollars, the original assignment of which was forwarded to and was received by the then Treasurer of the United States in his capacity as commissioner of the sinking fund, who, under date of September 4th, 1894, acknowledged the receipt of said assignment and promised to place the same on file, and the same was placed on file in the office of the said commissioner of the sinking fund, a copy of said assignment and of the receipt of said commissioner of the sinking fund being filed herewith and marked respectively U. S. L. I. & T. Co. Exhibit 3 and Exhibit 4 and prayed to be considered as parts of this bill.

5. That thereafter, to wit, on or about the 19th day of September, A. D. 1894, complainant first learned that a power of attorney (a copy of which is hereto annexed and marked U. S. L. I. & T. Co. Exhibit 5 and prayed to be considered as part of this bill) had been given by the said John J. Cudmore to the said defendant, Daniel B. Clarke, on the 20th of November, 1890, to secure an indebtedness

to the said National Bank of the Republic, and that said power of attorney was filed and was then on file in the office of the Comptroller of the Treasury; but the complainant avers that at the time and before the complainant purchased the said "retain," as aforesaid, no assignment or transfer thereof or power of attorney relating thereto appeared upon the records of the office of said comptroller, and there was none recorded therein; and complainant also avers that at the time it purchased said "retain," as aforesaid, the said power of attorney was not on file in the office of the said commissioner of the sinking fund of the District of Columbia, nor did any reference thereto appear on the books of said commissioner.

4 6. That the complainant is informed and believes, and therefore avers, that the said Treasurer of the United States, so being commissioner of the said sinking fund, as aforesaid, received, recognized, and recorded the assignment of the said Cudmore in favor of your complainant and promised to give notice of the investment of said "retain" for its benefit before the said power of attorney was filed in the office of the said Treasurer as *ex officio* commissioner of the sinking fund of the District of Columbia, as aforesaid; and your complainant further avers that the said power of attorney does not assign to the said Clarke the interest of the said Cudmore in and to the said "retain" held by the said Treasurer as commissioner of the sinking fund, as aforesaid, nor does it authorize or empower the said Clarke to collect or receive said "retain," but the complainant avers that said power of attorney in terms relates solely and exclusively to those moneys which were payable to said Cudmore "from the District of Columbia for and on account of work done and to be done under the provisions of contract numbered twelve hundred and seventy (1270) and was not intended to apply to said "retain."

7. That your complainant is informed and believes, and therefore avers, that the defendant John J. Cudmore is insolvent.

8. That all the conditions of said contract having been fully complied with by the said Cudmore, the said "retain" became due and payable to the said defendant, Cudmore, on the eleventh day of February, 1898, and thereupon the authority of the said defendant, Ellis H. Roberts, as commissioner of the said sinking fund, ceased and determined, and the complainant thereupon and by virtue of the said aforesaid assignment and power became authorized and em-

5 powered to demand, receive, and receipt for the same, and did, on the 12th day of Feb'y, 1898, make demand on the defendant Ellis H. Roberts, *ex officio* commissioner of the said sinking fund, for said "retain," but payment thereof was refused and the same is now held by the said defendant, Ellis H. Roberts, as commissioner of said sinking fund, as aforesaid.

9. That by reason of the premises and of the aforesaid assignment and power of attorney, the complainant has the right to demand and receive said "retain," and being the purchaser of the same in good faith, without any notice of any claim on the part of the said Bank of the Republic or of any other person, and the said

National Bank of the Republic, having failed to file the said power of attorney, was guilty of laches in the premises; the equity of complainant is superior to that of the said Bank of the Republic.

Wherefore, the premises considered, your complainant prays:

1. That the persons named as defendants herein be made parties defendant, hereto and served with process.

2. That the defendants John J. Cudmore, Daniel B. Clarke, and The National Bank of the Republic, their agents, attorneys, and assigns, be enjoined from receiving or collecting the said "retain" or any part of the moneys constituting the same now in the hands of the Treasurer of the United States as *ex officio* commissioner of the sinking fund, as aforesaid, retained under the provisions in the aforesaid contract between John J. Cudmore and the District of Columbia, numbered 1270.

3. That the Treasurer of the United States, as *ex officio* commissioner of the sinking fund of the District of Columbia, be restrained from paying over to any of the parties to this bill or
6 to any person or persons claiming under them whatever amount he now has in respect of the "retain" under the contract between John J. Cudmore and the District of Columbia, numbered 1270, until such time as it may be judicially determined to whom said amount shall be paid.

4. That this honorable court determine to whom the "retain" now in the hands of the Treasurer of the United States and held by him under contract numbered 1270, between John J. Cudmore and the District of Columbia, shall be paid, and that the said defendant, Cudmore, may be decreed to execute such further assignment, receipt, or acquittance as may be necessary to enable complainant to collect and receive said "retain."

5. And for such other and further relief as the court may in its discretion deem necessary and proper in the premises.

6. The defendants to this bill are John J. Cudmore, Daniel B. Clarke, The National Bank of the Republic of Washington, and the Treasurer of the United States.

UNITED SECURITY LIFE INSURANCE AND
[SEAL.] TRUST COMPANY OF PENNSYLVANIA,
By WM. VERNER, *Its President.*

NATH'L WILSON,
ANDREW Y. BRADLEY,
Solicitors for Complainant.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

William Verner solemnly, sincerely, and truly declares and affirms that the complainant, The United Security Life Insurance
7 and Trust Company of Pennsylvania, is a corporation duly incorporated under the laws of the State of Pennsylvania; that he is the president of said corporation; that he has read the foregoing and annexed bill of complaint subscribed by said

company by him as president thereof and knows the contents thereof; that he is conversant with the business of said company and with the facts set forth in said bill and obtained knowledge thereof as president, as aforesaid; that the facts stated in said bill as of his own knowledge are true, and those therein stated on information and belief he believes to be true.

WM. VERNER.

Affirmed and subscribed before me this nineteenth day of March, A. D. 1898.

JESSE WILLIAMS,
Notary Public.

[SEAL.]

U. S. L. I. & T. Co. EXHIBIT No. 3.

Filed Mar. 24, 1898.

Know all men by these presents that I, J. J. Cudmore, of the city of Washington, D. C., the contractor named in contract No. 1270 with the Commissioners of the District of Columbia, comprehending the laying of pipe sewers for value received, have sold, and do hereby sell, assign, transfer and set over to the United Security Life Insurance and Trust Company of Penna. its successors and assigns, all my interest, legal and equitable, in and to the sum of twenty-nine hundred and twenty dollars and sixty-four cents ($2,920.64) retained
8 by said Commissioners, on account of the said contract. And I do hereby authorize and empower the said United Security Life Insurance and Trust Co. of Pa. its successors and assigns to ask for and receive from the proper officers of the United States, or the District of Columbia, the interest now due, and hereafter to become due, on the bonds in which the said sum of twenty-nine hundred and twenty dollars and sixty-four cents ($2,920.64) is, or may be invested, and further, to receipt for, and give acquittance for, said interest now due, and hereafter to become due; and further, upon the expiration of the time, or fulfillment of the conditions, for which said bonds or money may be held, the said United Security Life Insurance and Trust Co. of Pa. its successors or assigns are hereby authorized to ask for, and receive from the proper officers of the United States, or the District of Columbia, the money or the bonds, in which the said sum of twenty-nine hundred and twenty dollars and sixty-four cents ($2,920.64) is or may be invested, and to receipt for, and give acquittance for said money or bonds, hereby authorizing and empowering the said United Security Life Insurance and Trust Company of Pa. its successors and assigns to do all and every act which may be necessary to be done, as fully and effectually as I might or could do, if personally present at the doing thereof, hereby ratifying and confirming all that the said United Security Life Ins. and Trust Co. of Pa., its successors or assigns may lawfully do, by virtue hereof.

In testimony whereof I have hereunto, set my hand and seal this 6th day of September, A. D. 1894.

J. J. CUDMORE.

The words "its successors" being interlined between the 5th & 6th, 8th & 9th, 15th & 16th, and 20th & 21st lines; and the
9 words "its successors and assigns" being interlined between the 22nd and 23rd lines before acknowledgment.

Witnesses:
E. QUINCY SMITH.
N. R. METCALF.

Witness:
HENRY W. REED.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me J. J. Cudmore, contractor, party to the foregoing assignment and power of attorney, and acknowledged the same to be his act and deed. I further certify that I am personally acquainted with the said J. J. Cudmore and know him to be the person named in said assignment and power of attorney. I further certify that the said assignment and power of attorney was read and fully explained to the said J. J. Cudmore at the time of acknowledgment.

In testimony whereof I have hereunto set my hand and affixed my official seal this 6th day of September, A. D. 1894.

E. QUINCY SMITH,
Notary Public.

[NOTARIAL SEAL.]

U. S. L. I. & T. Co. EXHIBIT No. 4.

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER,
WASHINGTON, D. C., *September* 8, '94.

F. H. Smith & Sons, 1418 F St. N. W., Washington, D. C.

GENTLEMEN: I have the honor to acknowledge the receipt
10 of your letter of the 6th instant enclosing an assignment of same date from J. J. Cudmore in favor of the United Security Life Insurance Company of Pennsylvania of the amount retained from his contract No. 1270 with the District of Columbia.

Said assignment will be placed on file, and you will be notified when the investment is made.

Respectfully yours, J. K. MELINE,
Ass't Treasurer U. S., ex Officio Com'r Sinking Fund, D. C.

Amount retained, $2,920.64.
H. M. BARRETT,
Sinking Fund Office, D. C.

U. S. L. I. & T. Co. Exhibit 5.

Filed Mar. 24, 1898.

Know all men by these presents, that I John J. Cudmore of Washington D. C. being indebted to the National Bank of the Republic of Washington D. C. in the full and just sum of ten thousand four hundred and fifty dollars and forty-seven cents, for monies advanced to me by the said bank for the purpose of carrying out my contract with the District of Columbia or the Commissioners thereof, have made constituted and appointed and by these presents do make constitute and appoint Dan'l B. Clarke president of Washington D. C. my true and lawful attorney irrevocable for me and in my name place and stead to demand ask sue for collect receipt
11 for endorse my name and receive all sums of money bonds or other valuable- which are due or may become due *or may become due*, owing or payable to me from the District of Columbia for and on account of work done and to be done under the provisions of contract numbered twelve hundred and seventy 1270 for laying 12, 15, 18, & 21-inch pipe sewers on various streets in the District of Columbia and for and on account of any other or extra work done by me for the District of Columbia aside from in addition to and independent of the said contract numbered 1270.

And for the purposes aforesaid I do hereby grant unto my said attorney full power and authority irrevocable being coupled with an interest to do and perform all and every act whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation hereby conferred, &c.

Dated Nov. 20, 1891.

Certified as true copy.
Jan'y 19, 1894.

B. B. BOWLES.

Order to invest: Sept. 6, 1890.

12 *Answer of Daniel B. Clarke.*

Filed Apr. 27, 1898.

In the Supreme Court of the District of Columbia.

The United Security Life Insurance and Trust Company *vs.* John J. Cudmore et al.	Equity. No. 19177.

Separate answer of defendant Daniel B. Clarke.

This defendant, for answer to so much and such parts of the bill of complaint filed herein as he deems it necessary and proper for him to make answer unto, answering, says:

That at the time of the execution of the power of attorney from the defendant John J. Cudmore to this defendant as president of the National Bank of the Republic, and for a long time prior and subsequent thereto, he was the president of said bank, and the said power of attorney was executed to him as president of said bank & in its interest, this defendant having no personal interest therein.

The defendant John J. Cudmore, a contractor with the District of Columbia for the performance of certain work under contract No. 1270 with said District, desiring to obtain the necessary funds to perform his said contract, made application to the National Bank of the Republic some time during the year 1890 for the loan to him, the said Cudmore, of various sums of money, as the same might be required from time to time to complete said contract; that the board of directors of the said bank agreed to loan and advance to the said Cudmore such moneys, but required that the said Cud-
13 more should execute a power of attorney to this defendant as president of the said bank, whereby this defendant as president of said bank should have full authority and power to collect all sums of money that might become due and payable under said contract, and accordingly on the 23rd day of August, 1890, the defendant John J. Cudmore executed a certain power of attorney, upon the regular form used in the office of the Commissioners of the District of Columbia, to this defendant as president of the National Bank of the Republic, wherein and whereby all the interest of said Cudmore in said contract No. 1270 was assigned to this defendant as president of the said bank, a copy of which said power of attorney is attached to the answer of the defendant The National Bank of the Republic filed herein; that said power of attorney was filed with the Commissioners of the District of Columbia on the 28th day of August, 1890, and on the same day transmitted by the Commissioners to the First Comptroller of the Treasury of the United States. After the execution of said power it was found that the said Cudmore was indebted to the National Bank of the Republic in a sum much larger than would be derived from said contract No. 1270, and the said Cudmore agreed that the said bank should have authority to collect from the District of Columbia any and all sums of money that might become due and owing to him, the said Cudmore, by virtue of other contracts which he, the said Cudmore, had with the District of Columbia, and accordingly, on the 20th day of November, 1891, after the completion of the work under the said contract No. 1270, and before all the moneys due thereunder had been paid, the said Cudmore executed to this defendant as president of the National Bank of the Republic a further power of attorney, being the same power of attorney attached to
14 the complainant's bill and marked Exhibit No. 5; which said power of attorney was filed with the Commissioners of the District of Columbia on the 24th day of November, 1891, and transmitted to the First Comptroller by the Commissioners on the 23rd day of September, 1893. At the time of the execution of the said second power of attorney, as aforesaid, the said John J. Cud-

more was indebted to the National Bank of the Republic in the sum of ten thousand four hundred and fifty dollars and forty-seven cents ($10,450.47), as recited in said power of attorney. This amount was increased by the subsequent payment of five hundred and ninety dollars and fifty-five cents ($590.55) by this defendant, as president of said bank and attorney of the said Cudmore, to the auditor for the District of Columbia by reason of certain claims against said Cudmore on account of said contract No. 1270, which, under the law, became a lien against the "retain" held by the Treasurer of the United States under the terms of said contract, which payment is evidenced by a certain receipt of J. T. Petty, auditor for the District of Columbia, a copy of which is filed as an exhibit to the answer of the National Bank of the Republic herein, and which payment the Commissioners of the District of Columbia required this defendant to make.

Further answering said bill, this defendant states that from and after the execution of the first power of attorney hereinbefove referred to all the payments under said contract No. 1270 were made by the Commissioners of the District of Columbia direct to this defendant, as the president of said bank and attorney of said John J. Cudmore, and this defendant was recognized as being the only person entitled to receive and receipt for said sums of money
15 under said power of attorney, and these payments under said contract No. 1270 continued to be made unto this defendant until the entire contract money had been paid, with the exception of the sum of two thousand nine hundred and twenty dollars and sixty-four cents ($2,920.64) which was deposited by the Commissioners of the District of Columbia with the Treasurer of the United States, there to remain until the five-year limit named by the terms of said contract had expired.

This defendant, further answering said bill, says that after the last-mentioned power of attorney had been transmitted to the First Comptroller of the Treasury the cashier of the National Bank of the Republic, by direction of this defendant, as president of the said bank, as aforesaid, requested the said comptroller to transmit a copy of the said power of attorney to the Treasurer of the United States, and in accordance with that request the comptroller did on or about the 19th day of January, 1894, transmit a copy of the said power of attorney to the Treasurer of the United States, in whose possession the same has since remained, as this defendant believes.

Further answering said bill, this defendant says that the said John J. Cudmore is still indebted to the National Bank of the Republic in a large sum of money, the exact amount of which he is unable to state, but he says that on the 3rd of November, 1894, the said bank obtained a judgment against the said Cudmore, on the law side of the supreme court of the District of Columbia, in cause No. 36943, for the sum of one thousand two hundred and ninety dollars ($1,290.00), with interest and costs, as shown by a short copy of said judgment filed as an exhibit to the answer of the defendant
16 The National Bank of the Republic, and also on the 3d day of March, 1894, in cause, law, No. 35535, the said bank ob-

tained another judgment against the said Cudmore for the sum of three thousand one hundred and ninety-eight dollars ($3,198.00), with interest and costs, as shown by a short copy of that judgment attached to the answer of the defendant The National Bank of the Republic filed herein, which said amounts were included in said sum of ten thousand four hundred and fifty dollars and forty-seven cents ($10,450.47), and for which the last-mentioned power of attorney, as aforesaid, was given.

Further answering said bill, this defendant says that on the 1st day of May, 1897, he resigned his position as president of the National Bank of the Republic, since which time he has had no connection with said bank.

Having fully answered, this defendant prays to be hence dismissed with his reasonable costs.

DAN'L B. CLARKE.

The defendant Daniel B. Clarke, being first duly sworn, deposes and says that he has read the answer by him subscribed and knows the contents thereof, and that the facts contained therein upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

DAN'L B. CLARKE.

JOHN B. LARNER,
Sol. for Def'd't Clarke.

Subscribed and sworn to before me this 26th day of April, 1898.

WILL. P. BOTELER,
Notary Public.

[SEAL.]

17 *Answer of Defendant The National Bank of the Republic.*

Filed Apr. 27, 1898.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE AND Trust Company
vs.
JOHN J. CUDMORE ET AL.
} Equity. No. 19177.

Separate answer of the defendant The National Bank of the Republic of Washington.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's bill of complaint contained, for answer thereunto, or to so much and such parts thereof as it is advised is or are material or necessary for it to make answer unto, this defendant, answering, saith :

One and two. It admits the allegations contained in the first and second paragraphs of said bill of complaint.

Three. In answer to the third paragraph of said bill of complaint, this defendant admits that it is true, as therein stated, that on the 14th of August, 1890, the defendant John J. Cudmore entered into a contract with the District of Columbia for the construction of certain sewers, etc., which said contract was numbered 1270, and a copy of which is hereto attached, marked Defendants' Exhibit No. 1, and made a part hereof; that after said contract had been duly executed and the work thereunder commenced the said Cudmore found that it would be necessary for him, in order to carry
18 out said contract in accordance with the terms thereof, to procure a certain amount of capital; that thereupon he made an arrangement with this defendant to loan to him, the said Cudmore, certain sums of money from time to time, to be used by him in doing the work under said contract; that by the arrangement so made by the said Cudmore with this defendant, as aforesaid, he, the said Cudmore, was to assign, set over, and transfer to this defendant, through its then president, the defendant Daniel B. Clarke, all his right, title, and interest in, to, and under said contract numbered 1270 and the proceeds thereof; that the said Cudmore did so assign, transfer, and set over to this defendant all his right, title, and interest in, to, and under said contract by a certain power of attorney dated August 23rd, 1890, wherein and whereby the defendant Daniel B. Clarke was, as the president and attorney of this defendant, authorized to demand, ask, sue for, collect, receipt for, indorse his (the said Cudmore's) name, and receive all sums of money, bonds, or other valuables which are due or may become due, owing or payable to the said Cudmore from the District of Columbia for and on account of work done and to be done under the provisions of contract numbered 1270 for the laying of certain sewers on various streets in said District, a copy of which said power of attorney is hereto attached, marked Defendants' Exhibit No. 2, and made a part hereof; that said power of attorney was filed with the Commissioners of the District of Columbia on the 28th day of August, 1890, and was transmitted by them the same day to the First Comptroller of the Treasury of the United States, in whose custody, as this defendant is informed and believes, it now is; that after the execution of said power of attorney it was found that the
19 said Cudmore was indebted to this defendant in an amount much larger than would be derived from the proceeds of said contract numbered 1270; whereupon the said Cudmore agreed to give to this defendant, through its then president, the defendant Daniel B. Clarke, another certain power of attorney, which would include not only the entire proceeds of said contract numbered 1270, but any and all other sums of money due to the said Cudmore from the District by reason of any other contracts or otherwise; that on the 20th day of November, 1891, the said Cudmore gave to the defendant Daniel B. Clarke, as president of this defendant, a second power of attorney, irrevocable, being coupled with an interest, authorizing the said Clarke to demand, ask, sue for, collect, receipt for, indorse his (Cudmore's) name, and receive all sums

of money, bonds, or other valuables which are due or may become due or payable to him from the District of Columbia for and on account of work done and to be done under the provisions of contract numbered 1270 for laying certain sewers on various streets in the District of Columbia and for and on account of any other extra work done by him (the said Cudmore) for the District of Columbia aside from, in addition to, and independent of said contract numbered 1270, said power of attorney expressly stating that it was given in confirmance of and supplementary to the power of attorney given the said Clarke by the said Cudmore on the 23rd of August, 1890, and hereinbefore referred to, a copy of said second power of attorney being hereto attached, marked Defendants' Exhibit No. 3, and made a part hereof; that said second power of attorney was filed with the Commissioners of the District Columbia on the 24th day of November, 1891, and was transmitted by them on the 23rd day of September,
20 1893, to the First Comptroller of the Treasury of the United States, in whose custody, as this defendant is informed and believes, it now is; that at the time of the execution of said second power of attorney the said Cudmore was, as therein stated, indebted to this defendant in the full sum of $10,450.47 for moneys advanced to him by this defendant to enable him to carry out his said contract with the District of Columbia; that the indebtedness of the said Cudmore to this defendant was subsequently increased $590.55 by the payment by this defendant of certain claims aggregating that amount against the said Cudmore for material furnished him and used in doing the work under contract numbered 1270; which claims had under the law become a lien on the "retain" under said contract held by the Treasurer of the United States; which claims were paid by this defendant through its then president, the defendant Daniel B. Clarke, on the 6th of July, 1893, as is evidenced by a receipt of the auditor of the District of Columbia, a copy of which is hereto attached, marked Defendants' Exhibit No. 4, and made a part hereof.

Further answering said paragraph, this defendant says that from and after the execution of said first-mentioned power of attorney all payments under said contract numbered 1270 were made by the Commissioners of the District of Columbia to this defendant through its then president, the defendant Daniel B. Clarke, this defendant being recognized as being alone entitled to receive and receipt for all sums of money due under said contract, and such payments continued to be made to this defendant in manner and form as aforesaid until the entire amount due under said contract had been paid, with the exception of the sum of $2,920.64, which was
21 deposited by the Commissioners of the District of Columbia with the Treasurer of the United States and designated as a "retain," to be kept by him as an additional security and a guaranty fund to keep the work done under the contract in repair for a period of five years from the date of the completion of the contract. This defendant is informed and believes that the Commissioners of

the District of Columbia transmitted said sum of $2,920.64, which was ten per centum of the entire amount of the contract, to the Treasurer of the United States on the 19th of June, 1893.

Further answering said paragraph, this defendant says that after said second power of attorney had been duly transmitted to the First Comptroller of the Treasury, as aforesaid, to wit, on the 21st day of November, 1893, the cashier of this defendant, Charles S. Bradley, wrote to said comptroller, asking whether said second power of attorney was on file in his office; that on the 27th day of November, 1893, the said cashier received a communication from the then acting First Comptroller, a copy of which is hereto attached, marked Defendants' Exhibit No. 5, and made a part hereof, stating that said second power of attorney was properly on file in his office; that on the 15th day of January, 1894, the said cashier wrote requesting the said comptroller to transmit a copy of said second power of attorney to the Treasurer of the United States; that on the 19th day of January, 1894, the said comptroller advised the said cashier that a copy of said second power of attorney, dated November 20th, 1891, had been transmitted to the Treasurer of the United States, in whose custody it still is, a copy of which said letter is hereto attached, marked Defendants' Exhibit No. 6, and made a part hereof.

22 Further answering said paragraph, this defendant says that on the 15th of February, 1898, the Commissioners of the District of Columbia approved the payment of said "retain" of $2,920.64 and transmitted such approval in writing to the Treasurer of the United States, who, on the 16th day of February, 1898, expressed himself as being ready and willing to pay said "retain" to the parties who might be entitled to receive it; that on or about the said 16th of February, 1898, this defendant, by its counsel, made due and formal demand upon the said Treasurer of the United States for the payment to it of said "retain" under and by virtue of the powers of attorney given it by the said Cudmore, as aforesaid, but said Treasurer refused to make such payment to this defendant, because of the claim to said fund made by the complainant herein.

Further answering said paragraph, this defendant says that the said John J. Cudmore, who was indebted to it at the time of the execution of said second power of attorney, on the 20th of November, 1891, in the sum of $10,450.47, is at this time indebted to it in the full sum of $15,141.97, together with the accrued and accruing interest thereon, which amount is represented by promissory notes of the said Cudmore, by two judgments against him, one for $3,198.00, with interest and costs, obtained in cause No. 35535 on the law side of this court, and the other for $1,290.00, with interest and costs, obtained in the same court in cause No. 36943, short copies of said judgments being hereto attached, marked Defendants' Exhibits Nos. 7 and 8, and made a part hereof, and by the receipt of the auditor of the District of Columbia for $590.55 paid by this defendant to said District, as aforesaid.

23 Four. For answer to the fourth paragraph of said bill of complaint this defendant says that it has no knowledge

whatever of the facts therein set forth as to an alleged sale or assignment to the complainant herein by the said Cudmore of the "retain" of $2,920.64 held by the Treasurer of the United States as aforesaid, but it denies that such sale or assignment was made by the said Cudmore in good faith and without notice that there was any other claim on file against said fund. On the contrary, this defendant avers that the said Cudmore was acting in a fraudulent manner when he offered to sell or assign his interest in said fund the second time, and when such sale or assignment was made by him to the complainant it was in fraud of the rights of this defendant. This defendant says that had the complainant or its agent used due and diligent care it would have discovered that the said Cudmore had already assigned all his right, title, and interest in and to the proceeds of said contract numbered 1270 to this defendant long prior to the month of September, 1894, and that at the time said alleged sale or assignment to the complainant was made the prior assignments to this defendant, hereinbefore referred to, or copies thereof, were on file in the offices of the Commissioners of the District of Columbia, the First Comptroller of the Treasury of the United States, and the Treasurer of the United States.

This defendant further alleges that the complainant was grossly negligent in the manner in which it endeavored to discover whether any prior assignments of said fund had been made and placed on record, in that it made no inquiry whatever at the office of the Commissioners of the District of Columbia, where the original contract with the said Cudmore was and where properly all
24 assignments of this character would be first filed in the usual, ordinary, and proper course of business. This defendant also alleges that the complainant made no investigation whatever of the records of the office of the First Comptroller of the Treasury, where such assignments of such contracts are usually filed in the regular course of business.

Five. For answer to the fifth paragraph of the bill of complaint filed herein, this defendant says that it is untrue, as therein alleged, that there was no transfer or assignments of said contract numbered 1270, or of the proceeds thereof, or powers of attorney relating thereto, on the records of the office of the comptroller of the Treasury or any entry relating thereto therein at the time said alleged assignment was made to the complainant. This defendant also denies that at the time the complainant is alleged to have purchased said "retain," as aforesaid, the powers of attorney held by this defendant were not on file in the office of the Treasurer of the United States as commissioner of the sinking fund of the District of Columbia, and that there was no reference thereto on the records of his office; on the contrary, this defendant avers that said second power of attorney to Daniel B. Clarke, as president of this defendant, was filed in the office of the comptroller of the Treasury on the 23rd of September, 1893, and a copy thereof sent by him to the Treasurer of the United States on the 19th of January, 1894; which copy was received by said Treasurer and filed in his office on the

20th day of January, 1894. This defendant further avers that at the time the said sale or assignment was made to the complain-t by the said Cudmore the powers of attorney given to this defendant by the said Cudmore were on file in the office of the Treas-
25 urer of the United States, and full record thereof was on the books of his office and would have been seen by the complainant or its agents had it or they made a personal examination or inspection of the books and papers in the case.

Six. For answer to the sixth paragraph of said bill of complaint, this defendant says that it is untrue, as therein alleged, that the Treasurer of the United States received, recognized, and recorded the assignment of the said Cudmore to the complainant and promised to give notice of the investment of said "retain" before said powers of attorney in favor of this defendant were on file in his office, as aforesaid. On the contrary, this defendant avers that at the time said Treasurer acknowleged the receipt of said alleged assignment to the complainant, said power of attorney to this defendant was in his custody, as he well knew.

Further answering said paragraph, this defendant denies that the said powers of attorney in favor of this defendant do not assign to the said Clarke, as the president of this defendant, the interest of the said Cudmore in and to said "retain" held by the Treasurer of the United States, as aforesaid, and that they do not authorize or empower the said Clarke to collect or receive said "retain," or that they in terms relate exclusively to moneys payable to the said Cudmore from the District of Columbia for and on account of work done or to be done under the provisions of said contract numbered 1270. On the contrary, this defendant avers that said powers of attorney in express terms contemplate the payment to this defendant of any and all sums of money becoming due under or by reason of said contract numbered 1270, whether the same be denominated as "retain" or otherwise, and also of all other moneys that might be or
26 become due and payable to the said Cudmore from the District of Columbia for any work done under any contract whatsoever for the District of Columbia. This defendant avers that said "retain" is simply one-tenth of the contract price for work done for the District of Columbia, which is retained as an additional security and a guaranty fund to insure the contractor strictly and faithfully performing the terms of his contract to the satisfaction of the Commissioners of the District of Columbia and to keep all new work in repair for a period of five years from the time of the completion of the contract, and that when said Cudmore disposed of all his interest in and to said contract numbered 1270 and the proceeds thereof by said powers of attorney to this defendant, he not only transferred his interest in and to said "retain" under said contract, but also all his interest in any and all other moneys due under said contract. This defendant further avers that at the time of the alleged assignment to the complainant the defendant Cudmore had no title to or interest in said contract or any of the proceeds thereof which he could lawfully sell or assign; nor did

whatever of the facts therein set forth as to an alleged sale or assignment to the complainant herein by the said Cudmore of the "retain" of $2,920.64 held by the Treasurer of the United States as aforesaid, but it denies that such sale or assignment was made by the said Cudmore in good faith and without notice that there was any other claim on file against said fund. On the contrary, this defendant avers that the said Cudmore was acting in a fraudulent manner when he offered to sell or assign his interest in said fund the second time, and when such sale or assignment was made by him to the complainant it was in fraud of the rights of this defendant. This defendant says that had the complainant or its agent used due and diligent care it would have discovered that the said Cudmore had already assigned all his right, title, and interest in and to the proceeds of said contract numbered 1270 to this defendant long prior to the month of September, 1894, and that at the time said alleged sale or assignment to the complainant was made the prior assignments to this defendant, hereinbefore referred to, or copies thereof, were on file in the offices of the Commissioners of the District of Columbia, the First Comptroller of the Treasury of the United States, and the Treasurer of the United States.

This defendant further alleges that the complainant was grossly negligent in the manner in which it endeavored to discover whether any prior assignments of said fund had been made and placed on record, in that it made no inquiry whatever at the office of the Commissioners of the District of Columbia, where the original contract with the said Cudmore was and where properly all
24 assignments of this character would be first filed in the usual, ordinary, and proper course of business. This defendant also alleges that the complainant made no investigation whatever of the records of the office of the First Comptroller of the Treasury, where such assignments of such contracts are usually filed in the regular course of business.

Five. For answer to the fifth paragraph of the bill of complaint filed herein, this defendant says that it is untrue, as therein alleged, that there was no transfer or assignments of said contract numbered 1270, or of the proceeds thereof, or powers of attorney relating thereto, on the records of the office of the comptroller of the Treasury or any entry relating thereto therein at the time said alleged assignment was made to the complainant. This defendant also denies that at the time the complainant is alleged to have purchased said "retain," as aforesaid, the powers of attorney held by this defendant were not on file in the office of the Treasurer of the United States as commissioner of the sinking fund of the District of Columbia, and that there was no reference thereto on the records of his office; on the contrary, this defendant avers that said second power of attorney to Daniel B. Clarke, as president of this defendant, was filed in the office of the comptroller of the Treasury on the 23rd of September, 1893, and a copy thereof sent by him to the Treasurer of the United States on the 19th of January, 1894; which copy was received by said Treasurer and filed in his office on the

20th day of January, 1894. This defendant further avers that at the time the said sale or assignment was made to the complain-t by the said Cudmore the powers of attorney given to this defendant by the said Cudmore were on file in the office of the Treas-
25 urer of the United States, and full record thereof was on the books of his office and would have been seen by the complainant or its agents had it or they made a personal examination or inspection of the books and papers in the case.

Six. For answer to the sixth paragraph of said bill of complaint, this defendant says that it is untrue, as therein alleged, that the Treasurer of the United States received, recognized, and recorded the assignment of the said Cudmore to the complainant and promised to give notice of the investment of said "retain" before said powers of attorney in favor of this defendant were on file in his office, as aforesaid. On the contrary, this defendant avers that at the time said Treasurer acknowleged the receipt of said alleged assignment to the complainant, said power of attorney to this defendant was in his custody, as he well knew.

Further answering said paragraph, this defendant denies that the said powers of attorney in favor of this defendant do not assign to the said Clarke, as the president of this defendant, the interest of the said Cudmore in and to said "retain" held by the Treasurer of the United States, as aforesaid, and that they do not authorize or empower the said Clarke to collect or receive said "retain," or that they in terms relate exclusively to moneys payable to the said Cudmore from the District of Columbia for and on account of work done or to be done under the provisions of said contract numbered 1270. On the contrary, this defendant avers that said powers of attorney in express terms contemplate the payment to this defendant of any and all sums of money becoming due under or by reason of said contract numbered 1270, whether the same be denominated as "retain" or otherwise, and also of all other moneys that might be or
26 become due and payable to the said Cudmore from the District of Columbia for any work done under any contract whatsoever for the District of Columbia. This defendant avers that said "retain" is simply one-tenth of the contract price for work done for the District of Columbia, which is retained as an additional security and a guaranty fund to insure the contractor strictly and faithfully performing the terms of his contract to the satisfaction of the Commissioners of the District of Columbia and to keep all new work in repair for a period of five years from the time of the completion of the contract, and that when said Cudmore disposed of all his interest in and to said contract numbered 1270 and the proceeds thereof by said powers of attorney to this defendant, he not only transferred his interest in and to said "retain" under said contract, but also all his interest in any and all other moneys due under said contract. This defendant further avers that at the time of the alleged assignment to the complainant the defendant Cudmore had no title to or interest in said contract or any of the proceeds thereof which he could lawfully sell or assign; nor did

the said Cudmore by said power of attorney to the complainant undertake or assume to revoke either of the powers of attorney theretofore given to the defendant.

Seven. For answer to the seventh paragraph of said bill of complaint, this defendant admits the allegations therein as to the insolvency of the said Cudmore.

Eighth. For answer to the eighth paragraph of said bill of complaint, this defendant admits that the terms of said contract numbered 1270, made by the said Cudmore with the District of Columbia, were complied with, but avers that they were only carried
27 out and the said "retain" kept intact by moneys advanced to the said Cudmore and to the District of Columbia direct by this defendant.

Further answering said paragraph, this defendant denies that the complainant ever at any time became entitled to receive said sum of $2,920.64 or any part thereof due under said contract numbered 1270 and now in possession of the Treasurer of the United States.

Nine. For answer to the ninth paragraph of said bill of complaint, this defendant denies that the complainant has any right to demand or receive said "retain" or any part thereof as a purchaser of the same in good faith, or that this defendant failed to file its powers of attorney and thereby gave the complainant a superior equity to that of this defendant. On the contrary, this defendant avers that it used every precaution to protect its interest and to comply with every rule, regulation, or business custom necessary to make known to any *bona fide* purchaser of the claim for value the fact that it had been already transferred to this defendant.

Further answering said bill of complaint, this defendant says that on the 5th day of April, 1898, the complainants, the defendants Daniel B. Clarke and John J. Cudmore, and this defendant, by consent, procured an order of this honorable court in this cause, authorizing and empowering the defendant Ellis H. Roberts, the Treasurer of the United States, to pay to the solicitors of record for the complainant and this defendant said sum of $2,920.64 held by him as a "retain" under said contract numbered 1270, as aforesaid, of which amount said attorneys were to pay to the defendant Cudmore the sum of $200.00, and to his solicitor the sum of
28 $50.00, and to deposit the remainder thereof, to wit, the sum of $2,670.64, in the National Metropolitan Bank of Washington to await the final decree in this cause; that the terms of this order have been fully complied with and said money is now in said bank awaiting any final decree that may be passed in this cause.

Having fully answered the complainant's bill of complaint filed herein, this defendant submits to the court that it is in equity and in good conscience entitled to the fund, amounting to $2,670.64, now on deposit, as aforesaid, in the National Metropolitan bank, and being the balance of the proceeds of said contract No. 1270, made by the defendant Cudmore with the District of Columbia, and

it therefore prays that this honorable court will pass an order directing the payment of said fund to it.

THE NATIONAL BANK OF THE REPUBLIC,
By JOHN B. LARNER, *V. Pres't.*

I, John B. Larner, vice-president of the National Bank of the Republic, being first duly sworn, depose and say that I have read the answer by me subscribed and know the contents thereof, and that the facts therein contained upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN B. LARNER.

Subscribed and sworn to before me this 26th day of April, 1898.

WILSON G. REED,
[SEAL.] *Notary Public, Dist. of Col.*

29 DEFENDANTS' EXHIBIT No. 2.

Know all men by these presents that I, John J. Cudmore, of Washington, D. C., have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Daniel B. Clarke, president, of the same place, my true and lawful attorney for me, and in my name, place, and stead to demand, ask, sue for, collect, receipt for, endorse my name, and receive all sums of money, bonds, or other valuables which are due or may become due, owing, or payable to me from the District of Columbia for and on account of work done and to be done under the provisions of contract numbered twelve hundred and seventy (1270) for laying 12, 15, 18, and 21-inch pipe sewers on various streets in the District of Columbia.

And for the purposes aforesaid I do hereby grant unto my said attorney full power and authority to do and perform all and every act whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof, hereby annulling and revoking all former powers of attorney or authorizations whatever in the premises.

In witness whereof I have hereunto set my hand and seal the twenty-third day of August, in the year one thousand eight hundred and ninety.

(Signed) JOHN J. CUDMORE.

Two witnesses:
(Signed) EDWARD NERVIS.
A. Y. LAKEMAN.

30 Personally appeared before me, the subscriber, a notary public for said District of Columbia, the aforenamed John J. Cudmore, to me well known, and acknowledged the foregoing

letter of attorney to be his free and voluntary act and deed for the purposes therein set forth.

DEFENDANTS' EXHIBIT No. 4.

OFFICE OF THE AUDITOR,
DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *July* 6, 1893.

$590.55.

Received of Dan'l B. Clarke, president, attorney for John J. Cudmore, five hundred and ninety and $\frac{55}{100}$ dollars, to be applied in payment of the following claims against said Cudmore on account of contract No. 1270 with the District of Columbia, to wit:

George White & Sons	$195.82
R. I. Nevitt	216.08
Jno. T. Springmann & Son	83.41
The Ivy City Brick Company	67.50
The Wash'n Brick Machine Co	27.74
	$590.55

J. T. PETTY,
Auditor, D. C.

31 DEFENDANTS' EXHIBIT No. 5.

NOVEMBER 27, 1893.

Charles B. Bradley, Esq., cashier the National Bank of the Republic, Washington, D. C.

SIR: In reply to your letter of the 21st instant, you are respectfully informed that the power of attorney mentioned therein is properly on file in this office as evidence that payments for work done under contract No. 1270 to Daniel B. Clarke had been authorized by John J. Cudmore.

If said power of attorney pertained only to the ten per cent. retained under that contract, it would properly be filed with the Treasurer of the United States, but it authorized the payment to said Daniel B. Clarke of any and all amounts that were or might become due under the above-named contract.

Respectfully yours,
C. M. FORCE,
Acting Comptroller.

DEFENDANTS' EXHIBIT No. 6.

JANUARY 19, 1894.

Charles S. Bradley, Esq., cashier the National Bank of the Republic, Washington, D. C.

SIR: In compliance with your letter of the 15th instant, a
32 copy of the power of attorney given by John J. Cudmore to Daniel B. Clarke, president, and dated November 20, 1891, has been sent to the Treasurer of the United States.

Respectfully yours,
R. W. BOWLER,
Comptroller.

Replication.

Filed May 27, 1898.

In the Supreme Court of the District of Columbia.

UNITED SECURITY, &C., COMPANY
vs.
JOHN J. CUDMORE ET AL. } Equity. 19177.

The complainant joins issue with the defendants Daniel B. Clarke and The National Bank of the Republic on their answers filed herein.

NATH'L WILSON,
Solicitor for Complainant.

33 *Decree Referring Cause to Auditor.*

Filed May 27, 1898.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY
vs.
JOHN J. CUDMORE ET AL. } Equity. No. 19177.

By consent of counsel it is this 27th day of May, 1898, ordered that this cause be, and the same is hereby, referred to the auditor of this court, with instructions to report upon the rights of the parties to the cause to the fund held by N. Wilson and John B. Larner, and on deposit with the National Metropolitan bank, and to this end he is authorized to take testimony in support of the claims of the parties and the averments made in the bill and answer herein.

W. S. COX, *J.*

We consent.
NATH'L WILSON,
E. L. WHITE,
Sols. for Complainant.
JOHN B. LARNER,
Sol'r for Defendant-.

34 *Order Granting Leave to Amend Bill.*

Filed Jun- 14, 1898.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE AND Trust Company of Pennsylvania, Complainants,
vs.
JOHN J. CUDMORE, THE NATIONAL BANK OF the Republic, *et al.*, Defendants.
} 19177, Eq. Doc. 44.

Upon hearing and considering the petition of the United Security Life Insurance and Trust Company for leave to amend its bill of complaint and to make John B. Larner a defendant thereto and the consent that the prayer of said petition may be granted—

It is ordered by the court in equity sitting, this 14th day of June, A. D. 1898, that the complainant have leave to amend his bill of complaint by adding thereto the following averment after paragraph IX:

X. "That complainant is informed and believes, and on information and belief charges, that on the — day of ——, A. D. 1897, the precise date being to the complainant unknown, the said Bank of the Republic, being in liquidation, sold, assigned, and transferred the said retain and claim therefor described in said bill of complaint and all its right, title, and interest therein and thereto and the proceeds thereof, and the moneys due or to become due in respect thereof to the said John B. Larner, and thereby the said John B. Larner became and now is the claimant of said retain and of the proceeds thereof and of said money, and the said National
35 Bank of the Republic has now no right, title, or interest therein or thereto.

And the complainant is informed and believes, and on information and belief charges, that the said John B. Larner had at and before the date of said transfer and assignment notice of the aforesaid assignment and transfer to complainant of said retain and claim and of the proceeds thereof, and is chargeable with notice of the said transfer and assignment, and that the equity of the petitioner to the said retain and to the proceeds thereof is prior in time and superior to the equity of the said John B. Larner."

And by adding to the second prayer of the bill of complaint the following:

"That the said John B. Larner, his agents, attorneys, etc., may be enjoined and restrained from demanding or receiving the said retain or the proceeds thereof or the moneys payable in respect thereof or any part thereof, and that the court will adjudge and decree that the complainant is entitled to receive the same, and that John B. Larner be made a defendant to said bill of complaint."

W. S. COX, *J.*

36 *Copies of Records of Treasury Department.*

Filed Jun- 16, 1898.

* * * * * * *

Endorsements with Powers of Attorney.

388.
No. 196,385, auditor's office, D. C.
Nov. [20, 23d, 1891.† 1893].*
John J. Cudmore.
Power of attorney to Daniel B. Clarke, president National Bank of the Republic of Washington.
(Received Sep. 22, 1893. Board of Commissioners, District of Columbia.)

OFFICE OF AUDITOR,
DISTRICT OF COLUMBIA,
WASHINGTON, *Sept.* 23, 1893.

Respectfully forwarded to the Commissioners D. C. for transmittal to the First Comptroller, U. S. Treasury.

J. T. PETTY,
Auditor, D. C.

Respectfully forwarded to the First Comptroller, U. S. Treasury.

JOHN W. ROSS,
President B'd Com'rs, D. C.

Sept. 25, 1893.

Mr. Glover.
Sept. 27, 1893.
E.

37 No. 9281. Office of auditor, D. C.
No. 168,395. Office of the Commissioners, D. C.
Aug. 26, 1890.
Bradley, Chas. S., cash'r Nat'l Bank of the Republic.
Encloses for record power of att'y from Jno. J. Cudmore to Dan'l B. Clarke to collect and receive moneys as they become due on his contract, 1270, with the D. C.
(Received Aug. 27, 1890. Board of Commissioners, District of Columbia.)

See L. S. C. O.

[* Words and figures enclosed in brackets erased in copy.]
[† In pencil in copy.]

OFFICE OF THE COMMISSIONERS OF THE
DISTRICT OF COLUMBIA, *August* 27, 1890.

Respectfully referred to auditor, D. C.
By order:

RODGER WILLIAMS,
Act'g Secretary.

E.
No. 9281.

OFFICE OF AUDITOR, D. C., *Aug.* 29, 1890.

Respectfully returned to the Commissioners D. C. for transmittal to the First Comptroller, U. S. Treasury.

J. T. PETTY,
Auditor, D. C.

AUG. 29, 1890.

Respectfully transmitted to First Comptroller, U. S. Treasury.
By order:

L. G. HINE,
Act'g Pres't B'd Comm'rs, D. C.

R. E.
Mr. Glover.
Aug. 30, 1890.

38 Copy.

Dan'l B. Clarke, president. Chas. S. Bradley, cashier.

875.

Government depository.

The National Bank of the Republic of Washington.

Capital, $200,000. Surplus, $125.00.

WASHINGTON, D. C., *Aug.* 26, 1890.

Hon. Commissioners of District of Col.

SIRS: I beg to enclose herewith for record in your office power of att'y from John J. Cudmore to Dan'l B. Clarke, pres't, to collect and receive monies as they become due on his contract No. 1270 with Dist. of Col.

Very respectfully, CHAS. S. BRADLEY, *Cash.*

39 * * * * * * * * * * *

File number.	Whom given by.	Whom given to.	Date.	Remarks.
*	* *	* * *	*	*
*	* *	* * *	*	*
Gen'l files *	* *	* * *	*	*
* 368	Cudmore, John J.....	Daniel B. Clarke, president.....	Aug. 23, 1890	To collect money under contract No. 1270.
* *	* *	* * *	*	*
* 388....	Cudmore, John J.....	Daniel B. Clarke, pres., D. C....	Nov. 20, '91	Authority to receive receipt for money under contract 1270.
* *	* *	* * *	*	*

40 *Answer of John B. Larner to Amended Bill.*

Filed Jul- 11, 1898.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE AND Trust Company
vs.
JOHN J. CUDMORE ET AL.
Equity. No. 19177.

Answer of John B. Larner to the amended bill filed herein on the 14th day of June, 1898.

For answer to so much and such parts of the bill of complaint and the amended bill filed herein as this defendant deems it necessary and proper for him to answer unto, answering, says:

That on the 27th day of November, 1897, he entered into an arrangement with the defendant The National Bank of the Republic whereby for a certain valuable consideration the said bank agreed that this defendant should be entitled to the interest of said bank in and to the proceeds of a certain contract made by the District of Columbia on the 14th day of August, 1890, with the defendant John J. Cudmore for the construction of certain sewers in the District of Columbia, which contract is numbered 1270, and the same contract referred to in these proceedings, which interest of the defendant bank was derived through certain powers of attorney or assignments from the said John J. Cudmore, dated respectively August 23, 1890, and November 20th, 1891, wherein and whereby the said Cudmore assigned all his right, title, and interest in and to said contract and the proceeds thereof to the said bank.

41 Said powers of attorney were duly filed with the Commissioners of the District of Columbia and by them transmitted to the Comptroller of the Treasury, who in turn, at the request of the said bank, transmitted the latter of said powers of attorney or assignments to the Treasurer of the United States, where the same was lodged on the 20th day of January, 1894.

Further answering, this defendant says that the said defendant bank never transferred its interest in said assignment to this defendant in any other manner or form than that hereinbefore stated. No written assignment or agreement of any kind has been executed or delivered by said bank to this defendant, and the bank agreed to prosecute the claim in its own name for the use of this defendant.

JOHN B. LARNER.

Answer of the National Bank of the Republic to Amended Bill.

Filed Jul- 11, 1898.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE AND Trust Company *vs.* JOHN J. CUDMORE ET AL. } Equity. No. 19177.

Answer of the defendant The National Bank of the Republic to the amended bill filed herein.

42 For answer to the amended bill this defendant states that on the 27th day of November, 1897, it entered into an arrangement with the defendant John B. Larner for a valuable consideration paid by the said Larner at the time, which arrangement was that the said Larner should be entitled to the interest of said bank in and to the proceeds of contract numbered 1270 made by the defendant John J. Cudmore with the District of Columbia, and in these proceedings fully described; that it was a part of the arrangement or agreement made with said Larner that the claim should be collected under the assignment from the said Cudmore to this defendant in the name of the bank, and that when collected by this defendant the said proceeds should be turned over to the said Larner; that the aforesaid agreement made with the said Larner was a verbal agreement, and no part or portion thereof was ever reduced to writing. There has never been nor was it ever contemplated that there should be any written assignment or transfer of said claim.

THE NATIONAL BANK OF THE REPUBLIC,
By JOHN B. LARNER,
V. President.

Replication.

Filed Jul- 15, 1898.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE AND Trust Company *vs.* JOHN J. CUDMORE ET AL. } Equity. No. 19177.

The complainant joins issue on the answer of John B.
43 Larner to the amended bill of complaint.

NATH'L WILSON, *Solicitor.*

Return of Secretary of Treasury.

Filed Jan. 3, 1900.

* * * * * * *

(Copy.)

Know all men by these presents that I, John J. Cudmore of the city of Washington, District of Columbia, the contractor named in contract No. 954 with the Commissioners of the District of Columbia, comprehending the sewering of various public highways in the District of Columbia, for value received have sold, and do hereby sell, assign, transfer and set over to the National Bank of the Republic of Washington, Wash'n, D. C. its successors and assigns, all my interest legal and equitable in and to the sum of twenty-nine hundred and forty-two and $\frac{98}{100}$ dollars ($2,942.98) retained by said Commissioners on account of said contract, and I do hereby authorize and empower the said National Bank of Republic of Wash'n, its successors and assigns, to ask for and receive from the proper officers of the United States or of the District of Columbia, the interest now due, and hereafter to become due on the bonds in which the said sum of twenty-nine hundred and forty-two $\frac{98}{100}$ dollars ($2,942.98) is invested, and further, to receipt for and give acquittance for said interest now due and hereafter to become due; and further, upon the expiration of the time of fulfillment of the conditions for which said bonds or money may be held, the said National Bank of the Republic of Wash'n, its successor or assigns are hereby authorized to ask for and receive from the proper officers of the United States or of the District of Columbia the money or bonds in which said sum of twenty-nine hundred and forty-two and $\frac{98}{100}$ dollars ($2,942.98) may be invested, and receipt for and give acquittance for said bonds and retained fund, hereby authorizing and empowering the said National Bank of the Republic of Washington its successor and assigns to do all and every act which may be necessary to be done, as fully and effectually as I might or could do if personally present at the doing thereof hereby ratifying and confirming all that the said National Bank of the Republic of Wash'n may lawfully do in virtue hereof.

44

In testimony whereof, I have hereunto set my hand and seal this nineteenth day of October, 1889.

JOHN J. CUDMORE. [SEAL.]

Witness-:

B. L. BALDWIN.

CHAS. S. BRADLEY.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me this 19th day of October, 1889, —— ——, party to the foregoing assignment and power of attorney, and acknowledged the same to be his act and deed. I further certify that I am personally acquainted with the said John J. Cudmore

and know him to be the person named in said assignment and letter of attorney. I further certify that the said assignment
45 and power of attorney was read and fully explained to the said John J. Cudmore at the time of acknowledgment.

In testimony whereof I have hereunto set my hand and affixed my official seal upon this instrument the day and year aforesaid.

[SEAL.] BRENTON L. BALDWIN,
Notary Public.

* * * * * * *

Report of Auditor.

Filed Apr. 7, 1900.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE and TRUST COMPANY *vs.* JOHN J. CUDMORE ET AL. } No. 19177, Equity Docket.

This cause is referred to the auditor to report upon the rights of the parties to the cause to the fund held by N. Wilson and John B. Larner and on deposit with the National Metropolitan bank. After due notice I proceeded under this order, and return herewith the testimony and exhibits submitted in proof.

The facts established in this reference are the following: On the 14th of August, 1890, the defendant Cudmore entered into contract with the District of Columbia, whereby he agreed to furnish the necessary labor and material and execute certain work, being
46 the construction of a pipe sewer, with the appurtenances, to be completed on or before July 1st, 1891. For the material so furnished and work so executed he was to receive certain prices specified in the contract, a copy of which is filed as an exhibit to the original bill and to the answer of the defendant The National Bank of the Republic. This contract is numbered 1270.

By a provision of law contained in the act of Congress of June 11th, 1878, contractors with the District of Columbia were required to keep the work performed by them in repair for the term of five years from the date of completion of their contracts, and the same act, section 5, provides that ten per centum of the cost of all new works shall be retained as a security and a guaranty fund to keep the same in repair for the said term; which per centum shall be invested in registered bonds of the United States or of the District of Columbia, and the interest thereon paid to said contractors.

On the 23rd of August, 1890, Cudmore executed a power of attorney to "Daniel B. Clarke, president, to demand, collect, and receive all sums of money, bonds, or other valuables" which were then due or might become due, owing or payable to him, Cudmore, from the District of Columbia for and on account of work done and to be done under the provisions of the said contract No. 1270. This document gave the said attorney full power and authority to per-

form all necessary acts in and about the premises. This power of attorney was filed with the Commissioners of the District on the 27th of August, 1890, and by them forwarded to the Comptroller of the Treasury two days later.

On the 20th of November, 1891, Cudmore executed a second power of attorney, reciting that, being indebted to the National Bank of the Republic of Washington, Wash., D. C., in the
47 just and full sum of $10,450.47 for moneys advanced to him by the said bank for the purpose of carrying out his contracts with the District or the Commissioners thereof, he, Cudmore, had made, constituted, and appointed, and thereby made, constituted, and appointed, Daniel B. Clarke, president, of Washington, D. C., his true and lawful attorney irrevocable, for him and in his name to demand, collect, receipt for, and receive all sums of money, bonds, or other valuables which were then due or might become due, owing, or payable to him from the District for work done and to be done under the provisions of the said contract No. 1270 and for any other extra work done by him for the District. The said Cudmore in this paper further and for the purposes aforesaid granted unto his said attorney full power and authority irrevocable, being coupled with an interest, to do and perform all acts necessary and requisite to be done in the premises. This power of attorney was filed with the Commissioners of the District on the 24th of November, 1891, and was transmitted to the Comptroller of the Treasury and received by him on the 23d of September, 1893. The amount of the retain from this contract was $2,920.64, and, as required by law, this retain was sent by the Commissioners of the District on the 22d of June, 1893, to the Treasurer of the United States, who by law holds the position of commissioner of the sinking fund of the District of Columbia, and as such received and held retains upon contracts for work for the District, as provided by the act of June 11th, 1878, above referred to. A copy of the second power of attorney was transmitted from the office of the Comptroller of the Treasury to that of the Treasurer, as commissioner of the sinking fund, on the 23d of January, 1894.

A record was kept in the office of the said Treasurer
48 wherein was entered the receipt of such retains, with the date and amount and other information as to the condition of the same, and the receipt of this retain was so entered in the record, as hereinafter more particularly set forth.

On the 6th of September 1894, the defendant Cudmore executed an assignment to the complainant of all his, Cudmore's, interest in and to this retain. The original assignment is filed in this reference as Complainant's Exhibit No. 2.

On the 15th of February, 1898, the District officers having certified that the work performed under the contract, at the expiration of the five-year period, was in good repair, and that no charges existed against the contractor for repairs during that period, which certificate was approved and settlement authorized by the Commissioners, a document stating these several facts and approvals was

transmitted to the Treasurer of the United States in a letter describing the said document as a voucher for the ten per cent. retain and authority for its settlement. This document is marked "Defendants' Exhibit A."

The National Bank of the Republic having entered upon liquidation, a special meeting of its directors was held on November 27th, 1897, at which time a committee previously appointed for the appraisement of remaining assets of the bank reported as on hand certain bills and notes, together with an asset described as "Treasury special," the amount of this asset so carried on the books being $2,062.73. The committee also reported other assets not carried on the books and an appraisement of the bills, notes, and "Treasury special," in which the latter asset was valued at $1,200.00, the total valuation of the said assets being $2,000.00. This report of the committee was adopted by the board, and it was further re-
49 solved that all overdue paper charged to profit and loss and all judgments and claims constituting the entire assets of the bank be included in a sale of all the said assets at a valuation of $200.00 additional. The minutes of that meeting further recite that the proceeds of such sale, amounting to $2,200.00, being available for distribution, it was resolved that a dividend of one per cent. on the capital stock be declared payable out of the profit and loss account, &c.

Although the fact does not appear in the recorded minutes of that meeting of the directors, it appears in proof here that John B. Larner, who was present at the meeting, became the purchaser of all the said assets for the said sum of $2,200.00.

On the 24th of March, 1898, the complainant filed his original bill setting forth the several proceedings from the making of the said contract 1270 to the filing of the assignment by Cudmore to the complainant in the office of the United States Treasurer, commissioner of the sinking fund, and that demand had been made upon the said commissioner by the complainant for payment to it of the said retain and the refusal of the commissioner to make such payment. The bill prayed that the defendants Cudmore, Clarke, and The National Bank of the Republic be enjoined from receiving the said retain and that the Treasurer of the United States be restrained from paying over the same, and that the court determine to whom the said retain, should be paid. Answers were filed by the defendants Clarke and The National Bank of the Republic, and on the 5th of April, by consent of all parties, a decretal order was made by the court that the said fund be paid over by the Treasurer of the United States to Nathaniel Wilson and John B. Larner, and
50 that thereupon the suit should be dismissed as to the said Treasurer without costs and without further order. The order further directed the said Wilson and Larner to pay to Cudmore and his attorney of record $250.

The money was paid over by the Treasurer as specified, and the sum named paid to Cudmore and his attorney, the remainder being held to await the final decree in this cause.

On the part of the complainant it is contended that neither of the powers of attorney covered the retain. As neither the original of the first power of attorney—that of August 23d, 1890—or any copy or notice of the existence of the same, was filed with or transmitted to the commissioner of the sinking fund, that document may be omitted from consideration as to its effect upon the retain.

It is argued by counsel that the retain was a separate and specific fund held and payable by the commissioner of the sinking fund, and could not be disposed of by a general power of attorney to receive moneys, bonds, &c., owing or payable to the contractor from the District of Columbia.

On the other hand, it is contended that the power of attorney operated as an equitable assignment vesting in Clarke all the rights, claims, and interest of Cudmore in the complete proceeds of the contract.

When the proof in this reference was first closed and the matter submitted to me I came to the conclusion that the power of attorney covered the retain, but there being no evidence to show what had been collected under the power or what disposition had been made of such collection, if any, the reference was opened to permit additional proof to be submitted generally.

Evidence has been furnished (including the records of the bank) in this reference establishing the fact that at the date of
51 the power of attorney Cudmore was indebted in the sum and manner recited in the power, and that the indebtedness remains unsatisfied at least to an amount largely in excess of this retain. By some process of book-keeping peculiar to banking institutions, the said indebtedness, excepting the sum of 2,062.73, had been carried into the profit & loss account, and this sum of 2,062.73 was carried in the books by the description of "Treasury special," intended to represent the retain in the Treasury in question here. Additional proof was also submitted by the complainant, showing that the bank acquired from Cudmore retains of the same character as the one in controversy here, taking in each case a distinct assignment elaborate in form and specifying the number of the contract, amount of retain, &c. Copies of three of these assignments are contained in the return of the Secretary of the Treasury, filed in this cause on January 3d, 1900, as follows:

Contract No. 954; assignment, October 19, 1889; amount of retain, 2,942.98; collected by bank October 2, 1894.

Contract No. 1170; assignment, July 9, 1890; amount of retain, 136.87; collected by bank June 24, 1895.

Contract No. 1195; assignment, July 9, 1890; amount of retain, 888.12; collected by bank June 24, 1895.

It also appears that the retain of another of Cudmore's contracts, No. 897, made in March, 1888, was sold and assigned to Anna B. Smith and paid to her.

In each of these four cases the National Bank of the Republic held powers of attorney to Clarke, president, and collected all the proceeds of the contracts excepting the retains.

52 It appears from the testimony of H. W. Barrett, the clerk in the office of the United States Treasurer in immediate charge of the sinking fund and retains, that a book or record was kept in that office designated "guaranty fund under District of Columbia contracts." The copy of the power of attorney of November 20th, 1891, which was received in the said office on January 20th, 1894, was not entered in this record, the only entries found therein relating to this retain being the following:

"Contract No. 1270; contractor, J. J. Cudmore; ledger folio, 184; retention date, June 22, 1893; amount, $2,920.64; assignment date, Sep. 6, 1894; assignee, United Security Life Insurance & Trust Co. of Pa., 603 & 605 Chestnut St., Phila."

Mr. Barrett testifies (page 12) that the said power of attorney or copy was not entered in this record for the reason that it was considered a paper which that office could not in any way act upon, having no reference in its body to the retain and no power of attorney to pay interest on the bonds in which the retain might be invested. Again, on page 17 of the testimony, referring to the conference between the Treasurer and himself as to this power of attorney, he testifies that their conclusion in the matter was that the document was not such an one as they could act upon, and states further that there had never been a power like it filed in that office, all assignments in regard to these retains which had been filed there being original transfers specifically describing the contract by number, the amount of the retain, and other details.

Taking this proof as to the practice and requirements of the office of the commissioner of the sinking fund in connection with the evidence of the practice of the bank in its previous purchase of

53 retains, it is argued that two controlling facts are established upon which the sufficiency of the power of attorney in question here may be determined—first, that the rules and practice of the office of the Treasurer as commissioner of the sinking fund require distinct specific assignment of the retain held by that office; and, second, that these rules and practice were well known to the bank and Clarke, attorney, and to Cudmore, and had been followed by them in every other case appearing here except contract No. 1270.

The proof sustains this contention, and I find these facts established. The evidence may be relevant also as tending to show the intention of the parties to the power of attorney, for the above-described separate assignments by Cudmore to the bank of retains on contracts for which the bank held powers of attorney antedate both powers of attorney affecting contract No. 1270.

But if these powers of attorney or the later one were held to include the retain as between Cudmore and the bank, the important question of notice would remain, and on this point I am compelled to find that the deposit of the copy of the power of attorney in the office of the commissioner of the sinking fund was not sufficient. The document was not, in form or substance, such as required by the rule and practice of that office, known to and theretofore rec-

ognized by the bank. It was not such as could be noted in the record of the retain in that office and was not so noted. It appears in evidence that the complainant, through the firm of Smith & Sons, had been a considerable purchaser of similar retains, and in this instance caused the same inquiry to be made as in other cases—that is, in the said office of the commissioner of the sinking fund.

Mr. Smith was informed by the official in charge of retains
54 and by an examination of the record that there was no claim against the retain in that office. It was suggested to him to inquire further at the District offices. Mr. Barrett explains that in making this suggestion he had in mind possible claims of the District for repairs. Mr. Smith made inquiry at the District offices, and was informed that the retain was free from claims there. It is sought to hold the complainant negligent in not having made a personal examination of the records of the District Commissioners, but, as the complainant was informed of the requirements and practice of the office of the commissioner of the sinking fund, there would not seem to be occasion for examining records elsewhere.

It does not appear that distinct assignments of retains were filed or required to be filed with the Commissioners of the District.

Under the provisions of the act of March 3, 1887, the Treasurer invested retains only upon request, and there seems to have been no investment and no request for investment of the retain in controversy, although in the cases of retains previously purchased by the bank they were invested.

In view of the facts and conditions established by the proof as herein found, I have to report a distribution of the fund as stated in the schedule herewith.

JAS. G. PAYNE, *Auditor.*

55 SCHEDULE.

Account of Retain.

Amount received from Ellis H. Roberts, Treasurer of the United States		$2,920.64
Paid to J. Altheus Johnson, attorney for John J. Cudmore	$50.00	
Paid to John J. Cudmore by order of court	200.00	
		250.00
		2,670.64
Commission to receivers	292.06	
Auditor's fee	75.00	
Testimony	48.00	
Costs of suit	53.30	
		468.36
Balance payable to the complainant		$2,202.28

As the custodian of the fund, the United States Treasurer, refused to decide between the conflicting claims, it became necessary to in-

stitute this proceeding to secure a determination of the matter by the court. I am of the opinion, therefore, that all the costs should be charged upon the fund.

JAS. G. PAYNE, *Auditor.*

56 UNITED SECURITY LIFE INSURANCE AND TRUST CO.
v.
CUDMORE ET AL.

JUNE 11, 1898—1 p. m.

Hearing pursuant to notice.

Present: Mr. Wilson for the complainant and Mr. Larner for the defendant- National Bank of the Republic and Daniel B. Clark.

It is agreed that on the 14th day of August, 1890, John J. Cudmore contracted with the District of Columbia for the construction of certain sewers under contract 1270, a copy of which said contract is filed herewith and marked Exhibit Cudmore No. 1.

It is also agreed that on the 23d day of August, 1890, Cudmore executed a power of attorney to Daniel B. Clark, a true copy of which is the exhibit filed, marked Exhibit Cudmore No. 2.

It is also admitted that on the 20th day of November, 1891, Cudmore gave another power of attorney to Daniel B. Clark, president of the National Bank of the Republic, copy of which power of attorney is filed herewith and marked Exhibit Cudmore No. 3.

It is also agreed that on the 6th day of July, 1893, the auditor of the District gave his receipt to Daniel B. Clark for $590.55, a copy of which is filed herewith and marked Exhibit Cudmore No. 4.

It is also admitted that on the 27th day of November, 1893, the acting comptroller wrote a letter to the cashier of the — Bank of the Republic, which letter is filed herewith and marked Exhibit No. 5.

It is also admitted that on the 19th of January, 1894, the comptroller wrote a letter to the cashier of the National Bank of
57 the Republic, a copy of which letter is filed herewith and marked Exhibit Cudmore No. 6.

It is also admitted that on the 6th day of September, 1894, Cudmore executed a certain power of attorney, copy of which is herewith filed and marked Exhibit No. 7.

It is also admitted that on the 22nd day of June, 1893, the Commissioners transmitted to the Treasurer of the United States the sum of $2,920.64, being ten per cent. of the amount of Cudmore's contract with the District of Columbia.

It is also stipulated that all the exhibits filed with the bill and answers shall be considered duly authenticated and in evidence.

It is also stipulated that the transcripts of records and certified copies transmitted to the clerk of this court by the Secretary of the Treasury June 15, 1898, and filed in this cause June 16, 1898, shall be considered as evidence duly authenticated.

It is also agreed that the papers filed herewith marked Complainant's Exhibits 4 and 5 are true copies respectively of the letter from

the Comptroller to the Treasurer of the United States, dates January 19, 1894, and of the entries that appear on the book called the "Guarantee Fund Record D. C. Contracts," in respect of contract No. 1270, and the certificate of H. W. Barrett, affixed thereto, is to be received as evidence of the facts therein stated, and that the original of Exhibit No. 4 contained a copy of the power of attorney therein referred to.

It is also agreed that letter of John T. Petty, auditor of the District of Columbia, to John B. Larner, dated October 14, 1898, and marked Defendants' Exhibit No. 6, shall be received as duly authenticated evidence of the statements made therein.

It is also agreed that all of the above papers admitted in
58 evidence shall be considered as not only duly authenticated, but as evidence of the facts stated in each paper respectively.

JUNE 13, 1898—3 p. m.

Hearing pursuant to adjournment.

Present: Mr. Wilson and Mr. Larner for the respective parties represented by them.

JOHN B. LARNER, a witness called for the complainant, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Mr. Larner, the answer in this cause is verified by you as vice-president of the National Bank of the Republic? A. Yes, sir.

Q. Also one of the defendants. That bank went into liquidation some time ago, I believe, did it not? A. It commenced liquidation the 1st of August, 1897.

Q. And is still in liquidation? A. Yes, sir.

Q. In whose possession and custody and control are the books and papers of the bank at the present time? A. They are in the custody and control of an acting cashier.

Q. Who is the acting cashier? A. Mr. J. Gales Moore.

Q. Have you the book or books or any paper or papers showing what, if any, disposition was made of the claim of Cudmore
59 or the claim known as the Cudmore claim, being a claim for a retain described in these proceedings and to which they relate? A. Yes, sir.

Q. What book have you in your possession or under your control showing the disposition made of the Cudmore claim?

Mr. LARNER: I object to that question upon the ground that it is immaterial as to what disposition the bank made of that claim.

Objection overruled.

A. I have in my possession the minute book of the board of directors of the Bank of the Republic.

Mr. WILSON: I ask the production of that minute book, and desire to give in evidence such portion of the minutes as shows any transfer of the Cudmore claim by the vote of the board.

Objected to by Mr. Larner and objection overruled.

A. Whatever minute there was showing the disposition made by the board of this claim.

Mr. Larner exhibits record of proceedings of the board on 27th of November, 1897, and presents a copy of the proceedings, which is filed, and it is agreed that the copy may stand in the place of the original.

The WITNESS: What was known as the Treasury special on this minute has reference to the Cudmore claim. This claim was at the time of the passage of the resolution carried on the books of the bank at $2,062.73. The claim of the bank against Cudmore amounted to many thousand dollars, but had been charged off on the books of the bank in the profit and loss account down to the sum of $2,062.73.

Q. The entire assets of the bank that the bank held on the
60 27th of November, 1897, were valued at and sold for the sum of $2,200? A. Yes. I qualify that by saying that it did not carry all of the assets, because there are some left.

Q. It carried everything that is described? A. Yes; everything that is described there.

Q. By whom was the $2,200 paid? A. Paid by me with my check—my money.

Q. And paid to whom? A. It was paid to the National Bank of the Republic.

Q. And distributed as a dividend, as appears here? A. Yes, sir.

Q. Is the action to which you have referred as taken by the board of directors on November 27, 1897, the only action taken by the board of directors in respect of the Cudmore claim? A. Yes, sir; it was never referred to again in the minutes of the bank, which, by reference, it will be found that there was only two more meetings had since that time.

Q. And by virtue of the payment of $2,200 you became entitled to all the assets described in this—— A. Described in there; yes, sir.

Q. Have you the book here which shows what this Treasury special account was? It is figured here as $2,062.73. A. Yes, sir.

Q. And the amount of the retain was twenty-nine hundred and some dollars, was it not? A. Yes, sir.

Q. If that refers to the Cudmore claim, why wasn't the
61 face value of the claim stated there? A. Because the retain itself was never carried on the books as such. It was only carried on the books of the bank as a sum total which Cudmore owed the bank. He owed the bank in the neighborhood of $13,000—from $10,000 to $13,000—and this assignment was given by Cudmore there, carried as—it was not carried as an asset to the claim itself; it never was referred to on the books of the bank as the Cudmore claim except as the balance that was due under the full amount of the Cudmore claim.

Q. And this special account, whatever it was—special Treasury account—was appraised at $1,200? A. Yes, sir.

Q. By whom was the appraisement made? A. By the committee that had charge of it.

Q. Who was the committee? A. I don't know whether it says there or not; I think the cashier and Mr. Parker, and there may have been another one; I don't remember.

Q. Would the minutes show who the committee was?

Mr. LARNER: I wish to make the same objection to this whole line of questions.

A. The committee consisted of the president of the bank, S. W. Woodward, E. S. Parker, and the cashier.

Q. Appointed at the meeting of—— A. Of November 22.

Q. I would like you to examine and state how it was that the Cudmore claim for this account called the Treasury special account relates to the Cudmore claim—how it came to be put down at $2,062.73 from the books. A. I can show from the minutes. By reference to the minutes of the National Bank of the Republic of June 8, 1892, it appears that on report of the president certain notes of Cudmore which he owed to the bank were charged off to the profit and loss account, and after that time the item was carried on the books of the profit and loss account of the bank as $2,062. Not having been in the bank at that time, I am unable to explain it.

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Q. There is no other reference on the books of the bank to the Cudmore claim? A. No other reference that I have ever seen.

Cross-examination:

The WITNESS: I want to explain the method of transfer on cross-examination. At the time the claim known as the Treasury special claim was taken by me from the bank and I paid the consideration of $2,200, as shown by the minutes, it was understood between myself and the board of directors——

Mr. WILSON: I object to any testimony by the witness as to any understanding between himself and the directors or agreement.

The WITNESS: It was agreed between the board of directors and myself that the Cudmore claim should be prosecuted in the name of the bank, and that the title to the claim should remain in the name of the bank, and that when the same was recovered by the bank that the proceeds should be paid to me. There never was any assignment or transfer to me by the bank of the Cudmore claim or any interest therein, as I at the time expressly refused to take any assignment, but stipulated that it should remain in the condition that it was then.

Mr. WILSON: That is objected to as incompetent and irrelevant, and, as a special objection, the act of the bank as a corporation could not be proved by any conversation between the witness and any of the officers or directors of the bank; that any agreement or understanding was absolutely ineffective to change the character of the transaction described in the minutes.

63

Redirect examination.

By Mr. WILSON:

Q. When did you first hear or know of the Cudmore claim or of the retain?

Objected to by Mr. Larner as being a matter of examination-in-chief, and objection overruled.

A. I first heard of the Cudmore claim in June or July, 1897, and I advised Mr. Wilson that I had this present arrangement at least two weeks before he filed the bill in this case.

Q. This assignment was made November 27, 1897? A. There never was any assignment made.

Q. I mean this meeting at which the action was taken as referred to was held on the 27th of November, 1897? A. Yes, sir.

Q. You had known of the claim for some time prior to that? A. Yes, sir.

Q. From whom did you know it? A. From the business of the bank.

Q. What knowledge did you have of it? A. I had no specific knowledge of it at all. I would say here that I had no specific knowledge of the character of this claim until just before the bill was filed and subsequent to the 27th day of November.

64 Q. Did you have any particular or special conversation in regard to the Cudmore claim at the time this meeting was held? A. No, sir.

Q. Was the agreement about it the same as in regard to all the other things that you bought? A. No, sir.

Q. Was there a special agreement in regard to the Cudmore claim? A. There was an arrangement such as I have already testified to.

Q. Was it special in regard to the Cudmore claim? A. It had reference to this particular claim.

Q. Why was it necessary to make any arrangement about this one? A. Because I knew it was some claim in the Government departments, and I knew there are certain restrictions in regard to assignments of funds in the hands of the Government.

Q. Prior to November 27, 1897, did you make any inquiry in regard to the condition of this one in the Treasury Department? A. No, sir; I never made any inquiry of the Treasury Department concerning this claim until about February, 1898, the time the retain fell due.

Q. Do you know of your own knowledge whether the officers of the bank knew the condition of the claim in the Treasury and what demands there were on the fund, on this retain fund? A. I can't say that. I don't think they knew any more about it than I did.

65 Q. You don't think they knew what had been filed in the Treasury Department? A. No, sir; I never knew myself what had been filed in the Treasury Department and had never seen your assignment until you filed this bill.

Q. You never inquired about it to see what there was there? A. I inquired about it just before the bill was filed.

Q. I mean before this transaction? A. No, sir.

Q. I would like to have you examine the books and see how this Treasury special account appears on the ledger or the journal of the bank? A. I know just how it appears, and I have already told you.

Mr. WILSON: I would like to have a copy of that account.

Hearing adjourned to the 14th instant at 3 o'clock p. m.

JUNE 15, 1898—3 p. m.

Hearing pursuant to adjournment.

Present: Mr. Wilson and Mr. Larner for respective parties represented by them.

HIRAM W. BARRETT testified as follows:

By Mr. WILSON:

Q. What is your occupation? A. My profession is book-keeper.

Q. In what department? A. Well, I am in the Treasury Department, but there is a very peculiar office here, office of the sinking fund of the District of Columbia.

66 Q. What are your duties? A. My duties are general, having general supervision of the matters pertaining to the District of Columbia coming under the Treasury jurisdiction.

Q. What have you to do with what are called the retains or sums that become due contractors under contracts with the District government? A. They are received by this office and invested, at the request of the contractor. There is some discretion on the part of the United States whether he might or not.

Q. Do you know J. J. Cudmore? A. I know him only as a contractor.

Q. You know him personally? A. Yes, sir; I know him when I see him.

Q. Have you any knowledge of a power of attorney from John J. Cudmore to Daniel B. Clark, president, given in respect of contract 1270 on or about the — day of August, 1890? A. I have no knowledge of it.

Q. How long have you been in the office of the sinking fund? A. Since July 1, 1878.

Q. You have had charge of all the papers relating to the sinking-fund retains? A. I have now.

Q. Since that time? A. Not all the time.

Q. Since when? A. Probably ten years since I have had exclusive charge.

Q. You have had exclusive charge for ten years of the
67 sinking fund and of the retains? A. Yes.

Q. State whether any such power of attorney is to be found in the files of this office or appears on any of the books of the

office. A. No such power, to my knowledge, has ever appeared here.

Q. Now, I will ask you what knowledge you have of a power of attorney from John J. Cudmore to Daniel B. Clark, president, dated the 20th day of November, 1891. A. There has a copy of that power of attorney been sent here by the comptroller.

Q. When was that sent here? A. The letter by the comptroller was dated the 19th day of January, 1894, stamped from the Treasurer's office, which shows it was received on the 20th of January, 1894.

Q. What disposition was made of that? A. Simply filed among the papers relating to Cudmore's contract.

Q. What, if any, entry was made of it on the books of the office? A. None whatever; not on the record.

Q. What record was kept of papers relating to these retains in the office of the—— A. All papers that embody a power of attorney to pay interest to any one are recorded in a place provided for them in the register, in order that we might send the interest checks to the proper parties.

Q. Did that show all papers that you considered related to the retain or disposition of the amount? A. Yes, sir.

68 Q. Why was not this paper enter- on the register? A. Because it was considered a paper that we could not act upon in any way. It had no reference in its body to the retention at all, and there was no power of attorney to pay interest on the bonds in which the retention might be invested.

Q. On receipt of that power, what action was taken by the commissioner of the sinking fund? What reply was made to the comptroller's office, if any? A. None whatever.

Q. What action was taken? A. Simply submitted to him, and he decided that could not be acted upon—simply filed away with the papers.

Q. By whom was it submitted? A. By me.

Q. When was that, with reference to the time of its reception? A. I suppose it was immediately after its receipt, to see what disposition was made of it, as was my custom.

Q. You took it to him personally? A. Yes, sir. I won't swear it was the Treasurer or Assistant Treasurer who was so acting.

Q. It was a matter for consideration between you, and after that it was not entered on the register? A. It was not entered on the register.

Q. But kept among the papers? A. Kept among the papers.

Q. What knowledge have you of a power of attorney from Cudmore and assignment relating to contract 1270, and bearing date on or about the 6th of September, 1894, on file here? A. There

69 was such a paper filed, purporting to be an assignment of the retention of the contract No. 1270 to the United Security Life Insurance and Trust Company of Philadelphia.

Q. When that paper was received what was done with it? A. When that paper was received a memorandum was made upon the

back showing that that power of attorney had also embodied a power of attorney to pay the interest.

Q. And that was entered on the register? A. That was entered on the register.

Q. Where has it been since that time and where is it now, the original paper? A. The original paper is in the files of this office.

Q. In the possession of this office? A. Yes, sir.

Q. When was the money due as a retain or retention under the contract with Cudmore, to which I have referred, received by you, and in what form, how was the money paid, when was that money paid, and in what way did you get the retain? A. Got it from the Commissioners of the District.

Q. How did they send it to you? A. In the shape of two checks.

Q. What date was that received? A. That date was June 22, 1893.

Q. What disposition was made of the money? A. The money was placed in the hands of the Treasurer, placed to the credit of the Treasurer of the United States in his capacity as sinking-fund commissioner.

Q. What was the exact amount? A. $2,920.64.

Q. That remained in your possession until it was paid over
70 under the agreement in this case? A. Yes, sir.

Q. Why was not the money invested so that interest could be drawn on it? A. Why, because the Treasurer of the United States, in view of all the complications likely to occur upon this matter, concluded it better not to invest it. The Treasurer of the United States thought it better not to complicate the matter any more, as he could not decide upon conflicting claims.

Q. So it was held uninvested? A. Uninvested.

Q. I will ask you to please produce the powers of attorney concerning which you have been interrogated—the powers of attorney and assignment concerning which you have been interrogated—and also the register as showing the history of this particular retain. A. Under the directions of the Treasurer, I can't do it.

Q. In respect of the omission to make any entry of the power of attorney that came to you, dated November 20, 1891, to Daniel B. Clark, president, will you state by what direction or authority such omission occurred? A. Direction of the Treasurer.

Q. And upon what, if any, decision or direction was his action based? A. Reading the power of attorney, there was nothing in that that he could act upon, in his opinion.

Q. Did he give any opinion to that effect? A. Not that I know of.

Q. Was this action in accordance with any previous de-
71 cision or ruling of the office? A. It seemed to be, in his judgment.

Q. If so, what was the decision?

Mr. LARNER: I object to that. Let us have the decision itself.

Q. Are you able to state what that decision was, and when it was

rendered? A. I am able to state a good many points in the decision.

Q. We want to get the decision. A. I can't do that; it was in reference to a particular case in which he decided various points.

Mr. LARNER: The answer is objected to because it is apparent from the witness' answer that it had no reference whatever to this case.

Q. The date of it you do not remember? A. No.

Q. Or whether it is in print? A. No; I don't know that.

Cross-examination.

By Mr. LARNER:

Q. Mr. Barrett, what is a retain? A. It is a ten per cent. deduction from the amount of the contract.

Q. Made by whom? A. The Commissioners.

Q. What Commissioners? A. Of the District.

Q. From what is this deduction made? A. From the amount of money due the contractor, I suppose.

72 Mr. WILSON: These questions are objected to, as all the information sought to be elicited appears on the face of the contract and the law.

Q. Why is this deduction made from the contract; for what purpose? A. It is made in accordance, as the law states, as a guarantee fund that they shall keep their new work in repair for a certain number of years.

Q. Then, as I understand it, this ten per cent. fund, which you call a retain, belongs to the contractor, subject to any claims that might be brought against him by reason of his contract?

Mr. WILSON: I object to that as immaterial and irrelevant.

A. Yes.

Q. But at the end of a certain period, unless something intervenes, it is paid to him by the Treasurer? A. Yes, sir; that is correct.

Q. You received, you said, Mr. Barrett, a power of attorney or assignment from the comptroller on or about the 20th day of January, 1894. Did you read that power of attorney? A. I did.

Q. Did you know the contents of it? A. Yes.

Q. Did you read it to the Treasurer of the United States? A. I either read it to him or he read it himself. I don't remember which.

Q. Then it is a fact that you as the officer in charge of this department and the Treasurer of the United States had full knowl-

73 edge of the contents of that power of attorney? A. Yes, sir.

Q. At the time you received that power of attorney was any money in the possession of your department, your possession or the possession of the Treasurer of the United States, which belonged to

John J. Cudmore under contract 1270? A. There was money here deposited as retention under that contract.

Q. How much was that money? A. $2,920.64.

Q. The reason why you did not file—did not make any memorandum of that power of attorney on your books was, was it not, that the Treasurer of the United States has certain duties prescribed to him under the law, namely, to hold that fund in cash or to invest it and pay the interest on the investment either to the contractor or his assignee? A. Not a word about the assignee.

Q. Well, to the contractor? A. To the contractor.

Q. And as this power of attorney which you had received had only reference to the ultimate disposition of the fund and not to any interest on any investment which the Treasurer was obliged to make, if requested, it was for that reason, as I say, that you made no record on your book? A. The decision about the matter was that the power was not such a power that we could act upon. There has never been any power like it filed here before.

Q. That is, in regard to the interest? A. Well, in regard to the interest or anything else. All assignments, if I might be allowed to remark, in regard to these retentions which have been filed here specifically describe the contract by number, the amount of
74 the retentions, and give the details.

Q. Did not this power of attorney specifically give the number of the contract? A. I believe so; yes.

Q. You knew, then, what contract it had reference to? A. Precisely.

Q. Did not that contract have reference to any bonds that might be in your possession? A. I believe that it did not say anything about possession of the bonds by the office. I believe "bonds" was recited in there.

Q. Would not the Treasurer of the United States have bonds if he invested? A. I believe he would.

Q. The fact remains, Mr. Barrett, that you received this power of attorney on the 20th day of January, 1894? A. Yes.

Q. You filed it amongst the papers of this office? A. Yes.

Q. With full knowledge of its contents? A. Yes.

Q. Yourself and the Treasurer? Now, at that time had you any notice of any assignment to the complainant in this case? A. Who is the complainant?

Q. The United Security Life Insurance and Trust Co. A. No.

Q. When was the first time that you had knowledge of assignment to that company? A. When they filed it here.

75 Q. When was that? A. They filed that the same date that it was executed—September 6, 1894.

Q. How was it filed? A. It was delivered over here by one of the young men from Smith & Co.; Cudmore was with him.

Q. Is this the Mr. Smith who is present here today—Mr. E. Quincy Smith? A. He was not the one that brought it here, according to my recollection of it.

Q. What did you do with that power of attorney? A. I put in

among the papers and put a memorandum on it and then went to the Treasurer and laid the whole matter before him.

Q. What matter did you lay before him? A. The paper I handed to him.

Q. You said the matter? A. I have reference only to this paper.

Q. At that time did you tell him about the other power of attorney being on file? A. No; I did not recollect it.

Q. How soon after that did you tell the Treasurer about the other power of attorney? A. It was about three or four days, probably.

Q. Then the reason why you carried the matter to the Treasurer was because there were two powers of attorney?

Mr. WILSON: I object to that question. That attributes to the witness something he did not say.

A. I did not carry the matter to the Treasurer until I was informed the bank would claim under this first power of attorney.

76 Q. How were you informed of that? A. By Bradley, the cashier.

Q. When did he come to see you? A. Two or three days after that, probably.

Q. After what? A. After the filing of this assignment.

Q. Then the whole matter of the two powers of attorney was discussed by the Treasurer and yourself? A. Yes; I took all the papers to him.

Q. Then it was concluded what? A. Concluded not to invest it, to exercise his discretion.

Q. Why? A. Because it would complicate the matter more, and it would likely cause litigation.

Q. Because of the two powers of attorney? A. Because of the two powers of attorney.

Q. Did any one ever have any interview with you concerning—did any one ever make any inquiry of you representing the complainant concerning the filing of any previous power of attorney; if so, when? *Q.* Well, the circumstance, as I remember, was this: Mr. Smith, present, come over here; Mr. Quincy Smith came over here.

Q. When? A. It was some days before he filed the assignment; I don't remember exactly how long. He asked me if I had anything against that contract. The record book lying there (on the desk)—I remember that circumstance distinctly—I opened it and said, "No; I did not have anything recorded against it."

77 Q. State the entire conversation you had with Mr. Quincy Smith. A. I have an indistinct recollection in my mind that there was some complication, and that was the reason I said to him that he had better let that retention alone; that he might get into litigation. I said, "There is more or less trouble with most of these sewer contracts, and particularly those of Cudmore."

Q. At that time you had a recollection of there being another

power on file in regard to it? A. There might have been in my mind. I did not recall that power at the time, but there was in my mind some indication. If you will allow me to explain, I knew there was a great deal of business between Cudmore and the bank. Cudmore had other retains here which had been assigned to the bank under regular assignment reciting the whole thing from beginning to end. If I recollect aright, it was in my mind that possibly they would file one of those papers on this very same contract, and, if my memory serves me rightly, that was the reason why I gave him the advice.

Q. When you say bank, what bank do you mean? A. The National Bank of the Republic.

Q. Of Washington? A. Of Washington.

Q. What did Mr. Smith say to that? A. Well, Mr. Smith—I can't tell exactly what he said, except that he did not think he was taking much risk, or something of that kind, and he left me under the impression, whether he said so or not, that he would investigate——

Mr. WILSON: Do not state your impression.

The WITNESS: My best recollection is that he said he did not think he was going to get into litigation about it, or some-
78 thing to that effect.

Q. Give just your recollection of the impressions the conversation made upon you.

Mr. WILSON: I object to statement of his impressions.

A. My impression left upon my mind was that he would pursue the matter no further and would give it up from what I said to him.

Q. Mr. Barrett, is this money that you received here, called the retain, received and held under section 5 of the act of June 11, 1878? State what act the money is received and held under. A. Yes; it is received under the terms of that act, as modified by subsequent legislation.

Q. What legislation modified it? A. Act of Congress of March 3, 1887.

Q. And what else? A. There was a previous act there—February 25, 1885—which provided how these things should be disposed of, but it is——

Q. Are those acts to which you refer embraced in the 16th Annual Report of the Treasurer, on pages 16 and 17? A. They are.

Redirect examination.

By Mr. WILSON:

Q. I understand you to say that the Bank of the Republic had filed here before frequently papers relating to retains. A. Yes, sir.

Mr. LARNER: I object to the question as having reference to another matter—another contract.

79 Q. And I will ask you whether this paper that was filed' to which we have called your attention, was different from the papers theretofore filed in regard to it. A. Entirely different from any other papers.

Mr. LARNER: The question and answer are objected to as having reference to other contracts.

Q. Who transacted here at your office the business of the Bank of the Republic relative to these retains? A. The cashier, Mr. Bradley.

Q. Charles Bradley? A. It was the cashier of the bank.

Q. You were called upon by Mr. Quincy Smith, I understand, who is now present, some days before this power of attorney or assignment, whatever it might be, directed to the complainant in this case, was filed? A. Yes, sir.

Q. How many days? Do you remember? A. No; I do not.

Q. A few days? A. A few days.

Q. Did he, Mr. Smith, examine the record of the register to which you have referred himself? A. No.

Q. Did he see it himself? A. No.

Q. You examined it? A. I examined it.

Q. And told him what? A. That I had nothing recorded against it.

Q. Did you say to him at that time or any other time, or to any one of the firm, that there was any paper on file in the office
80 here relating to this retain filed by the Bank of the Republic? A. No, sir; I did not; not to my recollection.

Q. Do you remember in the conversation, of which you have spoken, with Mr. Quincy Smith of suggesting to him that he should make inquiry of the District Commissioners in regard to this contract or this retain?

Objected to by Mr. Larner.

A. I would not like to state specifically that I did so, though, if my recollection serves me, something of that kind was asked about.

Q. How many times did he call to see you; do you remember? A. I can't state.

Q. Do you remember who it was that actually brought the paper here? A. It was a young man from Smith & Co.

Q. And that was the date on which it was entered on the register? A. On which it was entered on the register. Those things were attended to immediately, always.

Recross-examination.

By Mr. LARNER:

Q. Why did you refer Mr. Smith to the Commissioners? A. Because I thought there might be some complication if I did not. I do not remember that I did, as I stated before.

Q. Because there might be some complication. What do you mean? A. As I said to him, there *are* more or less complication

power on file in regard to it? A. There might have been in my mind. I did not recall that power at the time, but there was in my mind some indication. If you will allow me to explain, I knew there was a great deal of business between Cudmore and the bank. Cudmore had other retains here which had been assigned to the bank under regular assignment reciting the whole thing from beginning to end. If I recollect aright, it was in my mind that possibly they would file one of those papers on this very same contract, and, if my memory serves me rightly, that was the reason why I gave him the advice.

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Q. Because there might be some complication. What do you mean? A. As I said to him, there *are* more or less complication

with all these contracts. A contractor in default was likely to be called upon to use this retention, and if he should assign it
81 to somebody they were likely to lose. That was the object; not in reference to any power that I know of.

Q. Did you know whether he went there or not? A. I don't know whether he did or not.

Q. If a power of attorney on a contract is filed with the District Commissioners, do you know whether it is sent by them or what is done with it? A. In the process of settlement of their accounts if they pay anything out under a power of attorney they send their voucher, give the receipt of the contract, and as authority for that receipt they send their power of attorney to the comptroller in order to pass their account.

Q. And that explains why the power of attorney was in the possession of the comptroller before it came to you? A. Possibly that is the explanation. I don't know. I don't know anything about it, as far as that is concerned.

Redirect examination.

By Mr. WILSON:

Q. The cashier of the Bank of the Republic called on you a few days after this assignment to the complainant was filed? A. Yes, sir.

Q. And he was informed of its having been filed just previously? A. In the course of conversation in regard to other matters that came up.

Q. From that time did the cashier of the bank have communication with you on the subject of the retain? A. He simply told me then that he claimed this under this power.

82 Q. Under the power of attorney that had been previously filed? A. Yes; that was the first I knew that they did claim it under that power.

Q. And then you—— A. Notified Mr. Smith.

Q. Verbally or in writing? A. I sent the clerk over there and asked him to come over. Mr. Smith came over.

Q. Mr. Quincy Smith? A. Mr. Quincy Smith came over.

Q. What occurred then? A. Well, there was a great many things said; I don't recollect exactly. Bradley was sitting there (indicating) and Mr. Smith was outside.

Q. Mr. Bradley was here? A. Oh, yes; I remember they came purposely.

Q. And each stated their respective claims? A. Well, Mr. Bradley thought he had a good claim under this power. I think he read the power of attorney, if I recollect aright, and he claimed that his took precedence over the other because it was subsequent and acted——

Q. Mr. Bradley claimed it was his and belonged to them? A. Yes, sir.

Q. That was about the substance of it? A. Yes, sir; that has

been so long ago that what they said and what they did I can't remember, except the impression.

HIRAM W. BARRETT, having been called by Mr. Larner
83 as a witness for the defendant, testified as follows:

By Mr. LARNER:

Q. Mr. Barrett, when did you receive in this office the assignment or power of attorney from J. J. Cudmore to Daniel B. Clark, president of the National Bank of the Republic, assigning the interest of said Cudmore to the bank under contract No. 1270 with the District of Columbia? A. Well, your description of this power of attorney does not altogether agree with my idea about it.

Q. Well, that is the way it reads. A. There was a power of attorney sent here, dated November 20, 1891, and it was received here, according to the record stamped upon it, January 20, 1894. I do not indorse your interpretation of that power of attorney.

Q. From whence was it received? A. The Comptroller of the Treasury.

Q. Did you read the power of attorney? A. I did. I stated so before.

Q. Did the Treasurer of the United States have knowledge of the contents of the power of attorney? A. He did.

Q. Has a copy of that power of attorney been in your possession or possession of this office since the 20th day of January, 1894? A. It has.

Cross-examination.

By Mr. WILSON:

Q. When you speak of power of attorney, you mean copy? You never had the original? A. Never had the original; never saw it.

84 E. QUINCY SMITH, a witness called on behalf of the complainant, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. What is your occupation? A. Real-estate broker; member of the firm of F. H. Smith & Son.

Q. Who constitutes the firm? A. Francis H. Smith, Frank B. Smith, and myself.

Q. Were you a member of the firm in September, 1894? A. Yes, sir.

Q. Will you state what you know of the purchase by the complainant in this case of the retain on contract No. 1270 of J. J. Cudmore with the District of Columbia? A. Cudmore came into the office one day and said he had this retention for sale and stated the price he would take for it. We sent it over to the United Security Life Insurance and Trust Co., who agreed to purchase it at that

price. I then in the usual way went over to Mr. Barrett in the Treasury and inquired whether any assignment of that retain was on file. He looked at his register that was lying on the desk right in front of us and stated that there was no assignment on file, and the register was lying right in front of me, so he followed it along with his finger, and I could see there was no assignment in the assignment column. We had sold a good many of these retains, and I could go over and look them up just as well myself.

Q. Could you yourself see what entries there were on the register?

A. I saw there were no entries of an assignment; yes, sir.

85 I then told him that we purposed buying Mr. Cudmore's retain if it was all right. He stated that it was a doubtful wisdom in his mind to buy any sewer retains; that that was a sewer retain, and there had been trouble with quite a large number of them, and with a number of Cudmore's. I then asked him again if he knew of any special trouble in that contract, and he said no, but that if he were in my place he would make a further investigation at the District office.

Q. Immediately? A. Yes; a thing which I think we never did before in any other case of a purchase of a retention. Down at the District office I saw Mr. Petty, the auditor, and asked if there was anything wrong with this contract or any reason why we should not purchase it. He referred me to Mr. Donovan, who has those things directly in charge. I went to Mr. Donovan and I said, "Mr. Donovan, do you know anything wrong or anything peculiar about Cudmore's contract No. 1270 with the District or any reason why we should not buy it?" He, without referring to his books at all, said, "Yes, Mr. Smith, there is something quite peculiar about that contract;" and I said, "What is the peculiarity?" and he said, "When that contract was completed we found it very defective, and we notified Cudmore and his bondsmen that it would have to be fixed up. It was finally fixed up at a considerable expense by either Cudmore or his bondsmen. At that time they had spent so much money that we thought it only fair to them to say that in consideration of their having done all this work we would agree that no claim should ever be made hereafter upon the retention." I said, "Is that all there is wrong about it that you know?" and he said, "Yes." I then said, "If that is the case and you have agreed never to use this retention it is a good investment for us to

86 buy it, and better than anything we ever had before." He said, "Yes."

Mr. LARNER: I object to this testimony as being inadmissible, as it is hearsay.

Q. State what you did. A. Mr. Cudmore then in the course of a day or two—I don't know what day it was—executed this assignment and power of attorney on the usual form we had used theretofore. I went over to Mr. Barrett and said to him that I had made the inquiries mentioned in my last answer to the question and told him what I was told at the District office, and that we were going

to buy the retain; then, after Cudmore actually executed the assignment and power of attorney in the office, it is my recollection that I went over it and it was actually delivered to Mr. Barrett by one of the clerks in the office.

Q. Who was it? A. I think it was Norman Metcalf.

Q. When next did you hear anything about it? A. About three days afterwards Mr. Barrett sent his clerk, Andrews, over here to the office and said another paper of some sort relative to that retention had turned up, and asked me to come over there. I immediately went over there and found Mr. Bradley, the cashier of the National Bank of the Republic, there, and Mr. Bradley—I don't quite remember what did occur there. Mr. Bradley seemed surprised that there was any assignment to us there and stated to me that Cudmore several years before, as I remember now, had given them a general power of attorney of some sort to collect the proceeds of that contract, and we talked it over a little while, and I had quite a little argument with him there, and it was stated to him and Mr.
Barrett stated that he had advised us that there was no pre-
87 vious assignment there, and Mr. Barrett said to him that the
paper, a copy of which he had from the comptroller, purporting to be an assignment was such a paper that they could not recognize under the decision of the comptroller. That was the gist of it.

Q. That was what Mr. Barrett said to Mr. Bradley, the cashier? A. Yes.

Q. State what you know of the circumstances of the payment for the retain by the complainant in this case, what was paid, and how it was paid. A. We followed the same plan in that case that we had in a good many others. They accepted the purchase and authorized us to draw upon them for the amount, and we drew upon them September 6, 1894, for $2,000, pinning to the draft the duplicate assignment of the contract, the other assignment being recorded in the Treasury.

Q. Will you produce and give in evidence the draft, please, that was drawn?

The witness produces draft, which is offered in evidence and marked "Complainant's Exhibit No. 1."

Q. Will you produce and give in evidence the duplicate assignment by Cudmore at the time you refer to, and also the acknowledgement of receipt of the same from the Treasury?

The witness produces the papers in question, which are given in evidence by Mr. Wilson and marked Complainant's Exhibits Nos. 2 and 3.

Q. Will you state if up to the time of the filing of this assignment to the complainant in the office of the Treasurer you had any notice or intimation whatever of any prior assignment having been made?
A. None whatever. I was definitely assured by Mr. Barrett
88 to the contrary, that there was no assignment on file.

Cross-examination.

By Mr. LARNER:

Q. Mr. Smith, you have stated that you have purchased a great many of these retains. A. Yes, sir.

Q. Had you ever purchased any before for the complainant? A. Yes, sir.

Q. How many before? A. Well, I don't know. I should say six or eight, perhaps.

Q. Did you ever have any trouble with the others? A. No, sir.

Q. Always realized the full amount? A. Well, I only know that in a negative way, that if we had had trouble we would probably have been notified. I don't think we ever heard that they did not realize the entire amount.

Q. What was the usual discount on these claims? A. It varied.

Q. What was about the average? A. As I remember, the cheapest retention we ever bought was somewhere about fifty cents on the dollar, and we paid as high as ninety cents; dependent on the length of time they had to be retained and the rates at which the bonds were purchased.

Q. I am referring to the cases in which you purchased for this complainant. A. I can't state as to that, because I did not
89 set them aside particularly in my mind. I should say we had bought a hundred of these retains.

Q. Was this complainant engaged in the business of purchasing these retains? A. They had previously purchased a number of them from us.

Q. And after this one they stopped? A. That is my recollection.

Q. Were you the representative of The United Security Life Insurance and Trust Company here, the complainant? A. I don't think we were the sole representatives.

Q. But you were agents of theirs here, were you not? A. Well, I don't know whether we were their agents or Cudmore's.

Q. I am not talking about this case. I say you are the agents of that company here for the transaction of their business? A. We did a large amount of loan business for them. I don't think we were ever designated as agents.

Q. I ask you, then, the direct question, Whom did you represent in this transaction, Cudmore or the United Security Life Insurance and Trust Company? A. We represented ourselves for the commission in it.

Q. Who paid the commission? A. Cudmore.

Q. Did you receive any compensation from the other party, the complainant? A. I can't say; I don't remember.

Q. Have you no way of verifying it? A. I think it could be shown by reference to our ledger on that date.

90 Q. Have you a ledger here? A. I can get it.

Q. I wish you would get it. A. (After referring to ledger.) There is no entry of it.

Q. You have no recollection of that commission? A. No.

Q. What was the actual amount Cudmore got out of this? A. Do you mean what commission he paid us?

Q. Yes. A. I think he paid us about three per cent. That is the usual commission. That would be $60. He got all the rest of it.

Q. Mr. Smith; when you called at the office of the Treasurer did he give you access to the papers on file in the office? A. No, sir.

Q. Did you ask for permission to examine the papers and books on file in the office? A. No, sir; I followed just the plan we had always followed in previous purchases and relied on Mr. Barrett for the whole thing.

Q. When you went to the District Commissioners' office did you examine any papers or books there? A. I did not.

Q. Did you ask Mr. Donovan to show you any papers? A. No, sir.

Q. Did you ask to see the contract itself? A. No, sir.

Q. Did you ask to see any papers in reference to the con-
91 tract? A. No, sir.

Q. Did you ask to see the record books of the office in reference to the contract? A. No, sir.

Q. Then you were satisfied entirely with personal inquiries you made with the clerk in the office? A. That is right.

Q. Mr. Smith, you are familiar with the operation of these contracts, are you not—the methods adopted by the District Government and the Treasury in regard to these contracts? A. Only in a very general way.

Q. Didn't you know that this contract was made with the District of Columbia? A. Yes, sir; I supposed it was.

Q. Did you know when the contract was made? A. Only from what Mr. Barrett told me. The data for that power of attorney and assignment was obtained directly from Mr. Barrett's office. I think Mr. Cudmore handed us originally the letter from Mr. Barrett acknowledging receipt of the retention. I took that letter over to Mr. Barrett and compared the figures in that letter with the figures as he had them and with the data as he had them.

Q. Do you know what this retain was? Do you know what a retain is? A. I know that it is ten per cent. of the gross contract which is supposed to be held by the District under the law as a guaranty that the work will be kept in repair for a period of five years.

Q. Didn't you know that it was part of the proceeds of con-
92 tract 1270? A. I knew just what I told you.

Q. Didn't you know that if that was ten per cent. of the contract, that the other ninety per cent. must have been paid on the contract itself? A. I had no personal knowledge of it.

Q. You knew this was a contract with the District of Columbia that you were buying an interest in? A. Well, I suppose I knew it.

Q. Did you know what you were buying? A. The entire information I had about it came from Barrett's information.

Q. That is not the point at all. I ask you the direct question, Did you know what you were buying? A. Yes.

Q. Then what did you buy? A. I bought Cudmore's interest in the retention under his contract 1270.

Q. Then what is the retention? A. I think I gave you——

Q. Didn't you know that the retention—this ten per cent.—was part of the consideration of the contract 1270? A. I knew it was ten per cent. of the gross amount to be paid by the District for that contract.

Q. Did you know what it was retained for by the Government? A. It was retained as required under the statute as a guaranty for the work to be kept in repair for five years.

Q. And then what was done at the end of five years, if the work was kept in repair? A. Turned over to the contractor or contractors or his order.

93 Q. Did you make any investigation or examination for the purpose of determining whether Cudmore's interest in this contract or the proceeds of the contract had been assigned and such assignment placed of record in the comptroller's office? A. I made no investigation, except at Mr. Barrett's office and at the District office, as mentioned. Up to that time in all the retains we purchased I think there had been no investigation made, except at Mr. Barrett's office.

Q. You mean to say that you considered that you were proceeding in a business-like way to purchase an interest in a contract made with a person without making inquiry of that person as to whether there was anything due on the contract? A. I pursued the customary method we had always pursued in the sale of retentions.

Q. That is not my question. Do you consider it good business to purchase an interest in a contract made by a person with the District of Columbia without inquiring of the District of Columbia whether the party from whom you are purchasing has any interest? A. I inquired of Mr. Barrett, who is an officer of the District of Columbia, as far as the sinking fund goes, who, I understood, had charge of those retentions.

Q. But you did not consider it necessary to inquire of the maker of the contract, the District? A. I told you I did go down and inquire of Mr. Petty and Mr. Donovan.

Q. I say generally. A. Generally we only inquired of Mr. Barrett.

Q. Generally, as a matter of business, you thought it was
94 sufficient to—— A. Inquire of Mr. Barrett.

Redirect examination.

By Mr. WILSON:

Q. Was Mr. Cudmore with you when you went to see Mr. Barrett? A. I don't think he was.

Q. You had interviews with him whilst the negotiation was going on, do you remember? A. I think there were only two interviews with him.

Q. State whether you had any notice or intimation from Mr. Cudmore that he had made any previous assignment to any party. A. None whatever.

Recross-examination.

By Mr. LARNER:

Q. What did you do when you found out that there was on record another assignment of that contract? A. Well, I think that my brother Frank went down that night to see Mr. Cudmore, and it is my impression that he found him in such a condition that he could not do much business with him. Nothing further was done for a day or two, until he sobered up, and then he denied that the assignment, or whatever it was, with the Bank of the Republic ever existed with relation to that contract, and I remember he stated quite positively that if his signature had ever been put to an assignment to the Bank of the Republic for any part of contract 1270 it was a forgery.

Q. Then what did you do? A. We made an effort to locate the funds and to see if we could get hold of them.

95 Q. Why did you do that? A. Because I had been notified by Mr. Barrett that the Bank of the Republic also claimed the retention, and I thought it would probably be wise to get hold of the money if we could until it was decided whom the retention belonged to.

Q. If you had gotten hold of the money, then what? A. I would have had it.

Q. Did you get any money back from Cudmore? Did he promise to pay you any back?

Objected to by Mr. Wilson.

A. I don't think he ever did.

Q. Didn't he employ counsel with whom you conferred in regard to the matter, and was not promise made to refund? A. I don't know anything about his employing counsel. I don't think we ever saw any representative from him except his mother, and I think any promise he made was something like this: That no such assignment existed as was stated, and that we should never suffer any loss from it. If that is a promise, I think that is about what he made.

Q. Did you ever recover anything from him? A. No, sir.

Hearing adjourned subject to notice.

OCTOBER 10, 1898—4 p. m.

Hearing pursuant to notice.

Present: Mr. Wilson and Mr. Larner.

CHARLES S. BRADLEY, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Mr. Bradley, were you cashier of the National Bank of

96 the Republic of this city; and, if so, for what period? A.

From some month in the year 1881 until the close of the bank, December, 1897.

Q. What time in 1897? A. December; I have forgotten the date.

Q. Do you remember a transaction that the bank had with one J. J. Cudmore concerning a retain on contract 1270? A. Yes; I remember that.

Q. Will you state when you first knew, and by whom you were informed, of the assignment made by Cudmore to The United Security Life Insurance and Trust Company, the complainant in this case, of the retain on that contract? A. I don't remember the date, but it was at one time when I went to inquire of Mr. Barrett in regard to the entry on the books of the retain I found that it was not entered on his book, and he informed me then that it had been sold to somebody else. That was one of several occasions.

Q. I am speaking of the first time? A. Yes; I don't remember the date of the first time.

Q. Did you see the record yourself? A. Yes.

Q. Did you see on that record the entry? A. There was none.

Q. I mean notice of the transfer to the United Security Life Insurance and Trust Company? A. No; I don't think there was. I don't know about it, however.

Q. How came you to know that there was any? A. There was considerable delay at first in filing of the claim by the District office with the Treasury Department, and I went more than
97 once to the Treasury to find out whether it was on their books, and this particular time when Mr. Barrett informed me it had been sold was the first time I knew it had been sold; but I don't remember the date.

Q. At that time did you see the book? A. I don't remember as to looking for any entry of the United Security Company, but I saw his book and found there was no entry in favor of our bank. I don't think there was any entry for the other company, because Mr. Barrett explained to me afterwards that that register was kept only for such contracts as the retainer of which had been invested in bonds at the request of the assignee.

Q. When you heard of the transfer to the United Security Company—when you first heard of their claim as assignee of the Philadelphia Company—what, if any, steps did you take for the protection of the bank? A. I don't remember doing anything but reminding Mr. Barrett of the power of attorney which had been filed with the Treasury Department, and to which I thought I had called his attention before, and, knowing the custom of the Treasury, I knew that inasmuch as there was another claimant, the Treasury would recognize neither party until the ownership was established by some legal authority, so we did nothing. We deferred taking any steps whatever to establish our claim until the maturity of the retain.

Q. Do you remember being present at a meeting of the board of directors of the Bank of the Republic on November 27, 1897, copy

of the minutes of which meeting is shown you, being all in evidence and produced and shown by Mr. Larner? A. Yes, sir; I remember this meeting.

Q. Who were the officers of the bank at that time? A. Mr. S. W. Woodward was president; Mr. John B. Larner, vice-presi-
98 dent, and I was cashier.

Q. Who were the directors? A. The directors, E. S. Parker, S. W. Woodward, John B. Larner, H. G. Jacobs, E. D. Parker, A. W. Lothrop.

Q. How long had they been officers and directors of the bank at that time? A. From the time the bank was turned over to the new purchasers—May 1, I think it was, 1897.

Q. You were one of the committee referred to in those proceedings to put a valuation upon the certain assets described there, were you? A. Yes.

Q. Will you state if you remember that the entry there, "Treasury special," refers to this claim of Cudmore? A. Yes; it referred to the——

Q. To contract 1270? A. Yes; the retain in the Treasury.

Q. That was not the amount of the claim? A. That was not the full amount of the claim; no.

Q. What was the amount of the claim? A. I don't remember. The amount of the retain was, I think, twenty-four hundred and some dollars.

Q. And the amount that was due from Cudmore was—— A. The amount due from Cudmore was the amount of a number of unpaid discounted notes, some of which are still on hand.

Q. This was the amount carried on your books in respect of that claim? A. That claim simply; yes.

Q. Will you state how those figures were arrived at?
99 A. Well, the remaining assets, of which a statement is given there, were all considered uncertain assets, and the Treasury special was considered an uncertain item, inasmuch as we did not know when it could be settled. We felt sure that it could not be settled without a suit in court, and we would have to wait for that until after the maturity of the claim, and as the directors were desirous of closing up the bank as soon as possible and these were the only remaining assets, it was thought advisable to sell them at the best we could get for them for the purpose of making final dividend and closing up the affairs of the bank entirely. That was done with the proceeds of these assets. I think it made a dividend of about one per cent.

Q. Do you know how the estimate came to be for the sum named there, and by whom that was made? A. Well, as I recollect it, the committee went over these items, and, considering the uncertainty of collection, they decided to make—thought they could be sold for a certain amount, and that amount, I think, was referred to the board, and it was agreed upon as a reasonable one, under the circumstances, selling uncertain assets for the best they could get for them.

Q. At that time the board whose names appear there knew that there was an adverse assignment in respect of that Treasury special? A. Yes; that had been explained to the board, I know. They knew that there was another claim against it and the circumstances under which Cudmore had sold.

Q. Did they know what the claim amounted to? A. No; not the amount.

100 Q. Simply knew that there was a claim of another assignment by Cudmore—that Cudmore had sold to another party this same retain? A. Yes.

Q. Did they know who it was? A. I don't remember. I think they knew who it was. I think Mr. Smith had been down to the bank before it was sold——

Mr. LARNER: He is speaking of these directors.

A. I think the directors knew who Mr. Smith represented in purchasing. I can't say positively as to the name of the company, though; that was not known.

Q. I asked you before if you could state a little more definitely how the sum of $1,200 came to be fixed, if there was any process of calculation fixing the value of that asset at $1,200; by whom that figure was named.

Mr. LARNER: I object to that question. The witness has answered it thoroughly several times, and I do not see why we need to fill up this record with questions of that kind.

Objection overruled.

A. The two considerations entering into fixing the valuation were, first, the great uncertainty as to the final payment or final result of it, and the second, that it might be a long time before it could be collected, and that a purchaser would have to take all the chances of a possible lawsuit and the uncertainty of establishing the claim to the retain.

Q. Who fixed the valuation, do you remember? A. I don't know that I could say, excepting that it was discussed by the

101 committee, and I don't remember who made the suggestion.

Q. It appears from the minutes that all the assets of the bank—all the remaining assets of the bank—were sold for the sum therein specified. Do you know of any assets that remained unsold after that resolution was passed? A. No; there were no other assets at the bank; nothing remaining at all that had been in the bank excepting a few articles of furniture.

Q. What assets did remain, then, after the resolution was executed to which you have just referred?

Mr. LARNER: I object to that as immaterial. I do not see what bearing that has upon the case at all.

A. There was nothing else besides the office furniture. That included all the book assets.

Q. Will you state if, to your personal knowledge, the money received from that sale was disbursed—paid out? A. Yes; it was

disbursed. $2,200 was the amount, and $2,000 was disbursed to the shareholders, and the other $200 was used for the final expenses of closing up the books, employees, etc.

Q. State, so far as you have any personal knowledge as cashier of the bank or had at that time, whether the bank, after the sale therein referred to, had any interest, right, or title in this asset—this claim. A. Not as a bank. The bank's interest in all assets closed, as I understood, with this sale. They were sold and the amounts distributed. With that last distribution of the assets the bank virtually closed all.

Q. State if, as cashier of the bank, you have any knowledge of any arrangement by which the bank was to retain the actual
102 or nominal title to this asset for any purpose whatever. A. I don't remember any such. I don't see how, as an officer of the bank, I could have made such, because my official connection closed with the close of the bank.

Q. I mean whether while you were there you knew of any such arrangement or understanding. A. I don't remember any.

Q. Were you secretary of the board? A. I was secretary of the board; yes; not as a director, but merely clerk.

Q. You were not one of the directors? A. No.

Q. How long did you say you remained cashier of the bank? A. From 1881 until the bank was closed out in December, 1897.

Q. December following this November? A. Yes.

Q. Was this the last dividend? A. That was the last dividend; that one per cent.

Q. That included and disposed of all—— A. That disposed of all the assets; the final disposition of the assets.

Cross-examination.

By Mr. LARNER:

Q. Mr. Bradley, you state here that you do not remember when you first heard of the assignment made by Cudmore to the complainant? A. Yes.
103 Q. But that you heard of it when you went to call on Mr. Barrett at the Treasury Department? A. Yes; one of several occasions.

Q. When you first heard of that assignment was it prior or subsequent to the assignments which were made to the bank? A. It was subsequent; long subsequent.

Q. At the time you heard that Cudmore had made another assignment of the claim the assignment of the bank had already been filed in the Treasury Department? A. Yes.

Q. And a copy was in the office of Mr.—— A. I think a copy was in the office of Mr. Barrett at that time. It was shortly after, because the comptroller sent it down to him.

Q. Do you know when Mr. Cudmore's claim was assigned to the complainant? A. No; I do not.

Q. The record shows that the assignment to Clark as president

of the bank was filed with the Treasurer on the 20th of January, 1894, and that the assignment to the complainant was made on the 6th day of September, 1894. Was it before or subsequent to the 20th day of January, 1894, that you made this discovery? A. It must have been subsequent to January, because, if I recollect correctly, Mr. Barrett told me of this assignment to the Philadelphia company a short time after it had occurred. I think I went to the Treasury a short time after it had happened. I was there before and in the office of the District Commissioners. In filing this
104 power of attorney with the Treasury Department I had to go down there several times and inquire about it and see why it was not sent up; that was the reason it was not filed until 1894; I think it was made back in 1891.

Q. Mr. Bradley, can you state approximately about how much Cudmore was indebted to the bank? A. It was over ten thousand dollars.

Q. It is about that amount at the present time? A. Yes.

Q. In regard to the meeting of the board of directors at the time this claim was disposed of, will you state whether I had anything whatever to do with fixing the amount of the valuation of these assets? A. I think not. The committee, I think, was Mr. Parker and Mr. Woodward.

Q. Don't you remember of my stating to the directors at that meeting that I would not take a written assignment of that contract, and that I would proceed to recover, if I could recover, in the name of the bank? A. I don't remember. I haven't any recollection of it, but it may have been done.

Q. As a matter of fact, was there ever any assignment made of that power of attorney to me? A. No.

Q. It still remains in the hands of the bank? A. Yes.

Testimony announced as closed on both sides.

A copy of the minutes of the special meeting of the directors of the National Bank of the Republic, referred to in the testi-
105 mony of Mr. Larner and Mr. Bradley, is filed and marked "Exhibit referred to in testimony of J. B. Larner."

OCTOBER 17, 1898.

Mr. Larner files with the auditor copies of papers on file in the office of the commissioner of the sinking fund of the District of Columbia, consisting of copy of certificate of Commissioners authorizing the settlement of contract 1270; letter of the auditor of the District of Columbia transmitting certificate or voucher for the retains, and a certificate of H. W. Barrett, of the chief office of the sinking fund, D. C., that the said copies are true and correct copies of the papers on file in that office.

This paper bears the indorsement of the solicitor for the complainant that he has no objection to the filing of the paper under the stipulations already made.

OCTOBER —, 1898.

The subjects-matter of the reference are argued by Mr. Wilson for the complainant and Mr. Larner for the defendants.

The auditor submits to counsel orally a statement of his views in the present condition of the proof, and counsel for the defendants requested leave to present further evidence, which is granted.

106 DECEMBER 18TH, 1899—2 o'clock p. m.

Hearing pursuant to adjournment.

Present: Messrs. Wilson & Wilson, Mattingly and Larner.

H. W. BARRETT, having been recalled, testifies as follows:

By Mr. WILSON:

Q. Mr. Barrett, have you in your official possession a document purporting to be an assignment of John J. Cudmore to the National Bank of the Republic October 19th, 1889, of a retain on contract No. 954? A. That is the paper that you asked for (producing paper).

Mr. Mattingly objects on the ground that it relates to a transaction long prior to the power of attorney and this account involved in this case.

Mr. WILSON: The paper I offer in evidence purports to be an assignment by J. J. Cudmore to the National Bank of the Republic of a sum of $2,942.98 as the retain by the Commissioners on account of the contract described in the assignment, purporting to be signed by Mr. Cudmore and witnessed by Mr. Bradley and Mr. Baldwin October 19th, 1889.

I offer that paper for the purpose of showing the method of conduct of business between the bank and Cudmore, and to show the fact that after the account began in 1888, as shown by the evidence already produced, this and a number of other retains were purchased by the bank and separate assignments taken therefor, and the monies were collected, and in the accounts produced they do not appear to have been credited to Cudmore.

The auditor allows this testimony to come in, subject to a motion to strike out.

107 It is agreed that a copy of this paper may be filed, marked "Exhibit Barrett A."

Q. Have you the receipt for the retain referred to in the paper given in evidence? A. I have. The receipt is dated October 2d, 1894.

Receipt for $2,250.00 in 4 per cent. bonds, and signed by Mr. Bradley, cashier, on printed form, is offered in evidence and filed, marked "Exhibit Barrett B."

Q. The receipt is on a printed blank. Please state what knowledge you have of the use of such printed blanks as receipts. A. They are used for receipts in the final settlement.

Q. Who prepared that statement? A. I did. It appears to be signed by me.

Q. Have you in your possession, and, if so, will you produce, the assignment dated July 9th, 1890, purporting to be an assignment of the retain? A. Yes sir; it is an assignment of retain on contract 1170.

Q. Purporting to be signed by J. J. Cudmore for the sum of $136.87? Whose writing is at the bottom? A. I do not know.

This assignment is offered in evidence, marked "Exhibit Barrett D."

Mr. Barrett explains that sometimes these receipts are reduced from the original amount by drawbacks from the Commissioners. This one shows no evidence of such proceeding, as the assignment and receipt agree in amount.

Q. Will you produce an assignment, if you have it, of the date of July 9th, 1890, of retain on contract 1195? A. Yes, sir.
108 (Produces one.)

This assignment is offered in evidence, marked "Exhibit Barrett E."

Q. Have you the receipt for that? A. Yes, sir; the receipt is dated June 24th, 1895, for $888.12.

Cross-examination.

By Mr. MATTINGLY:

Q. Have you the papers here relative to contract No. 897? A. No, sir.

JOHN J. CUDMORE, having first been duly sworn, testifies as follows:

By Mr. WILSON:

Q. This suit relates to a retain under a contract that you had with the District for laying sewer pipe, dated August 14, 1890, contract No. 1270. Are you the John J. Cudmore who was a party to that contract? A. Yes, sir.

Q. There is on file here a paper purporting to be signed by you, dated September 8th, 1894, and purporting to be a transfer of your retain in that contract. Will you examine that paper and state whether you identify your signature? (Hands witness paper.) A. Yes, sir; that is my signature.

Q. It purports to assign the amount of a retain of $2,920.64. What consideration did you receive for that assignment and from whom? A. I think it was eighteen hundred and some odd
109 dollars, I received from Mr. Smith.

Q. Who was Mr. Smith? A. He was a man who lives in this city. He had a place on F street, on the south side, between 14th and 15th streets.

Q. Who did you deliver the assignment to? A. Mr. Smith made out the papers and I just signed them, and then we went down to the bank on F street and drew the check.

Q. Did you go to the Treasury with him? A. No, sir.

Q. State when, how, and under what circumstances, if at all, you made any transfer and assignment of this retain.

Mr. Mattingly objects, and question is withdrawn.

Q. What, if any, other paper did you execute in respect to the collection or disposition of the retain on the contract herein referred to?

Mr. Mattingly objects. Objection sustained.

Q. The Bank of the Republic collected all moneys due you in respect to this contract? A. Yes, sir.

Q. Now, had you had dealings with them in respect to your contracts with the District? A. Yes, sir.

Q. When did this begin? A. I think in 1888.

Q. Do you know what the contracts were for?

Question withdrawn.

Q. Whatever contracts you had with the District were exe-
110 cuted with the assistance of the bank? A. Yes, sir. The bank helped me in the way of letting me have money for expenses, wages, material, &c., and when a retain came due I was in debt to the bank. I couldn't say how much. Mr. Bradley kept the accounts.

Q. What, if any, moneys did you yourself have or receive? A. I didn't have any. I paid the money the bank gave me into the work as it proceeded, and the bank collected the money from the contracts.

Q. What, if any, purchase of a retain separate from the general account did they make of you?

Objected to by Mr. Mattingly, and objection sustained.

Q. Mr. Cudmore, in respect to your contract dated August 18, 1888, the retain was $2,660.62. Will you state in respect to that retain if you received from the bank $2,660.62 or any sum? A. I received money for the work, and when I wanted a settlement Mr. Bradley said I was in debt to the bank.

Q. Did the bank pay you that money in hand? A. No, sir.

Q. In respect to the retain under the contract of August 14, 1889, the amount was $1,368.70, and the retain was $136.87, and a contract dated March 23d, 1888. Will you state in respect to the retain in these cases? A. There were three retains which I sold to the bank. When I had my contracts finished I would be in their debt. Then they would allow me 60 or 70 cents on the dollar for these retains or give me credit. There was a regular agreement made out by Mr. Rock, of the District office.

Q. In respect of this retain, what did you do in the way of disposition or transfer?

111 Mr. Mattingly objects. Objection sustained. Mr. Wilson notes exception.

Q. Have you any recollection of the final payments that were made under the three contracts that preceded this last one made in 1888 and June, 1890? Do you remember these? A. I remember the work.

Q. Can you state the disposition or what became of the money in that case?

Mr. Mattingly objects. Objection overruled.

Q. Will you state whether you got the money, or the bank? A. Since 1888, all money I have handled was to pay labor and material. The bank handled the money.

Q. The proceeds of the contracts went to the bank and they collected the money? A. Yes, sir.

Cross-examination.

By Mr. MATTINGLY:

Q. I understand, Mr. Cudmore, that all these amounts that Mr. Wilson has been talking about, you got the money to pay for labor and material and they got your notes? You got the labor and material and they got the notes? A. Yes, sir.

A copy of voucher from the District of Columbia called for by Mr. Wilson is filed and marked Exhibit "Auditor No. —."

Hearing adjourned to Friday, Dec. 22d, 1899, at 2 o'clock p. m.

112 (Copy.)

COMPLAINANT'S EXHIBIT No. 4.

TREASURY DEPARTMENT, I. L. A.
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, D. C., *January* 19, 1894.

Hon. D. N. Morgan, Treasurer of the United States.

SIR: At the request of the cashier of the National Bank of the Republic of Washington, D. C., I send you the enclosed copy of a power of attorney given by John J. Cudmore to Daniel B. Clarke, president of said bank, and dated November 20, 1891.

Respectfully yours,

(Signed) R. B. BOWLER,
Comptroller.

E. M. C.

(Endorsed.)

#3199.

(Received Jan. 20, 1894, A. M., Treasurer.)
Washington, D. C., Jan. 19, 1894.
1st Comptroller U. S. Treasury.
Encloses copy of power of attorney from John J. Cudmore authorizing Daniel B. Clarke, president of Nat'l Bank of Republic, to collect from Cudmore's contract No. 1270, &c.

113 COMPLAINANT'S EXHIBIT No. 5.

No. 17. TREASURY DEPARTMENT.

In a book labeled "Guaranty Fund under D. C. Contracts" appears on page 25 the following:

Contract No. 1270; contractor, J. J. Cudmore; ledger folio, 184; retention date, June 22, 1893; amount, $2,920.64; assignment date, Sep. 6, 1894; assignee, United Security Life Insurance & Trust Co. of Pa., 603 *x* 605 Chestnut St., Phila.

These entries are in my handwriting made on the several dates specified. On the 6th of Sep., 1894, there were no other entries on the said record in respect to the assignment of said contract.

H. W. BARRETT,
Clerk in Charge.

DEFENDANTS' EXHIBIT NUMBER 5.

I. L. A.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, D. C., *November* 27, 1893.

Charles B. Bradley, Esq., cashier the National Bank of the Republic, Washington, D. C.

114 SIR: In reply to your letter of the 21st instant, you are respectfully informed that the power of attorney mentioned therein is properly on file in this office as evidence that payments for work done under contract No. 1270 to Daniel B. Clarke had been authorized by John J. Cudmore.

If said power of attorney pertained only to the ten per cent. retained under that contract it would properly be filed with the Treasurer of the United States, but it authorized the payment to said Daniel B. Clarke of any and all amounts that were or might become due under the above-named contract.

Respectfully yours,

C. M. FORCE,
Acting Comptroller.

J. J. G.

DEFENDANTS' EXHIBIT No. 6.

TREASURY DEPARTMENT, I. L. A.
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, D. C., *January* 19, 1894.

Charles S. Bradley, Esq., cashier the National Bank of the Republic, Washington, D. C.

SIR: In compliance with your letter of the 15th instant, a copy of the power of attorney given by John J. Cudmore to Daniel B. Clarke, president, and dated November 20, 1891, has been sent to the Treasurer of the United States.

Respectfully yours,

R. B. BOWLER,
Comptroller.

E. M. C.

115 DEFENDANTS' EXHIBIT NO. 6.

WASHINGTON, D. C., *October* 14*th*, 1898.

John B. Larner, Esq., Washington, D. C.

DEAR SIR: Replying to your favor of the 13th inst. in reference to certain powers of attorney filed in this office in connection with the contract of John J. Cudmore, No. 1270, I have to advise you:

First. That the power of attorney from John J. Cudmore to Daniel B. Clarke, president of the National Bank of the Republic, dated August 23rd, 1890, in reference to contract No. 1270 of the District of Columbia, with John J. Cudmore, was received in this office, as shown by the records, on the 28th of August, 1890, and was transmitted to the First Comptroller of the Treasury on the same day.

Second. That the power of attorney from John J. Cudmore to Daniel B. Clarke, president of the National Bank of the Republic, dated November 20th, 1891, in reference to contract No. 1270 of the District of Columbia with John J. Cudmore, was received in this office, as shown by the records, on the 24th day of November, 1892, and was transmitted to the First Comptroller of the Treasury on the 23rd of September, 1893.

Yours very truly,

J. T. PETTY,
Auditor, D. C.

(The following appears in lead pencil at bottom of page:) Retain rec'd by the com'r of S. F., 22 of June, 1893.

116 EXHIBIT PETTY, MAY 3, '99.

OFFICE OF THE
AUDITOR OF THE DISTRICT OF COLUMBIA,
WASHINGTON, *June* 20, 1898.

John B. Larner, Esq., 1335 F St. N. W.

DEAR SIR: Replying to your inquiries of this date, I have to state:

1. That contract 1270 with John J. Cudmore was dated August 14, 1890, and final measurement was given Feb'y 11, 1893.

2. Payments to amount of $20,924.06 were made to Daniel B. Clarke, president, attorney for John J. Cudmore.

3. The retent was transmitted to the Treasurer U. S. June 19, 1893.

4. The amount of the retent was $2,920.64.

5. Cudmore's bondsmen were W. W. McCullough, Talbot C. Murray, and Thos. J. Mason.

6. Power of attorney from Cudmore to Daniel B. Clarke, dated August 23, 1890, was received August 28, 1890, and transmitted to First Comptroller U. S. Treasury same date.

7. Power of attorney from Cudmore to Daniel B. Clarke, president, dated November 20, 1891, was received November 24, 1891, and transmitted September 23, 1893, to First Comptroller of U. S. Treasury.

8. Copies of these powers of attorney were made when the originals were filed, and have been in the custody of this office since that time.

9. Our records show when these powers of attorney were filed.

Very truly yours,

J. T. PETTY,
Auditor, D. C.

117 DEFENDANTS' EXHIBIT A.

Guarantee Fund, District of Columbia.

WASHINGTON, D. C., *January 3d*, 1898.

District of Columbia to J. J. Cudmore, Dr.

To amount of ten per cent. retained as a guarantee fund and further security for the repairs of sewers on streets named below during a period of five years from date of final measurement under contract No. 1270.

Street.	From—	To—	Date of final measurement.	Amount retained.	
Various.	.....	.....	February 11th, 1893	$2,920.64	O K.

I certify that I have had carefully examined the sewers named in this voucher, and that at the completion of the five years they were in good repair, and no charges exist against the contractor for repairs during that period.

Feb'y 11th, 1898.

D. E. McCOMB,
Superintendent of Sewers.

Approved:
LANSING H. BEACH,
Capt. of Engineers, U. S. A., Assistant Engineer Commissioner, D. C.

EXECUTIVE OFFICE, D. C., *Feb'y 15th*, 1898.

Approved and settlement authorized.

JOHN W. ROSS,
JOHN B. WIGHT,
Commissioners D. C.

Approved:
A. McKENZIE,
Acting Auditor, D. C.

118 I hereby certify that the copies hereto attached as follows:

First. Certificate of Commission-rs D. C. authorizing settlement of contract 1270 (on first page hereof);

Second. Letter of auditor D. C. transmitting certificate and authorizing settlement (on third page hereof);

are true and correct copies of papers on file in this office in reference to said contract No. 1270 with J. J. Cudmore.

October 17, 1898.

H. W. BARRETT,
Chief Office of Sinking Fund D. C.

OFFICE OF THE AUDITOR, DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *Feb'y 15th*, 1898.

SIR: I have the honor to transmit herewith a voucher for the 10 % retained from the cost of work done under contract No. 1270 with J. J. Cudmore, amounting to $2,920.64, which has been approved by the Commissioners of the District of Columbia, and its settlement authorized.

Very respectfully,

A. McKENZIE,
Act'g Auditor D. C.

Hon. Ellis H. Roberts, Treasurer U. S., Washington, D. C.

(Endorsed:) I have no objection to the filing of this paper under the stipulations already made. Oct. 17, 1898. Nath'l Wilson, sol. for compl't.

119 *Exceptions to Auditor's Report.*

Filed Apr. 10, 1900.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE and Trust Company
vs.
JOHN J. CUDMORE ET AL.
} No. 19177. In Equity.

The defendants The National Bank of the Republic and John B. Larner severally except to the report of the auditor of the court filed herein on the seventh day of April, 1900, because:

1st. He awards the balance of said fund, $2,202.28, to the complainant, instead of awarding the same to one or the other of these defendants.

2nd. He finds that the rules and practice of the office of the Treasurer of the United States, as commissioner of the sinking fund, require distinct specific assignment of the retain by that office, and that these rules and practice were well known to the bank and Clarke, attorney, and to Cudmore, and had been followed by them in every other case, and that the proof of these circumstances may be evidence relevant as tending to show the intention of the parties to the power of attorney.

3rd. He finds that if the powers of attorney or the later one were

held to include the retain, the deposit of the copy of the power of attorney in the office of the commissioner of the sinking fund was not sufficient notice of the assignment or pledge of said retain.

120 Because he did not find from the pleadings and proofs in the cause:

4th. That the entire proceeds of said contract No. 1270 had been equitably assigned to said bank.

5th. That said bank had done all that was incumbent upon it to do and all that it could do to give notice to persons proposing to deal with the amount due by the District under said contract or with said retain of its claim upon and title thereto.

6th. That complainant had constructive notice that said bank was entitled to said retain.

7th. That complainant was guilty of negligence in not making proper inquiry before purchasing said retain.

8th. That complainant was not entitled to said retain.

9th. That either said bank or John B. Larner was entitled to said retain.

10th. That the defendant John B. Larner was entitled to said fund in the hands of said Wilson and Larner.

WM. F. MATTINGLY,
Solicitor for said Defendants, Exceptors.

121 *Decree.*

Filed May 10, 1900.

In the Supreme Court of the District of Columbia.

THE UNITED SECURITY LIFE INSURANCE AND Trust Company
vs.
JOHN J. CUDMORE ET AL.
} #19177. In Equity.

This cause came on for hearing upon the exceptions to the report and account of the auditor filed herein on the 7th day of April, 1900, on behalf of the National Bank of the Republic and John B. Larner, and was argued by the respective counsel and considered by the court.

It is thereupon, this tenth day of May, 1900, by the court and the authority thereof, adjudged, ordered, and decreed that the said several exceptions be, and the same are hereby, overruled, and that said report and account of the auditor be, and the same is hereby, ratified and confirmed, and that said sum of twenty-two hundred and two dollars and twenty-eight cents ($2,202.28) reported by the auditor be paid over to the plaintiff or its solicitor.

A. B. HAGNER,
Asso. Justice.

122 *Appeal.*

Supreme Court of the District of Columbia.

UNITED SECURITY LIFE INS. & TRUST CO.
vs.
NAT. BANK OF THE REPUBLIC, JOHN B. LARNER. } Equity. No. 19177.

The clerk will please enter appeal from judgment of special term to Court of Appeals for defendants Nat. Bank of Republic & John B. Larner.

WM. F. MATTINGLY &
JOHN B. LARNER, *Sols.*

Appeal as ordered entered 1900, 5, 14.
BY CL'K.

Memorandum.

May 16, 1900.—Appeal bond filed.

123 *Waiver of Citation.*

Filed May 16, 1900.

In the Supreme Court of the District of Columbia, the 16th Day of May, 1900.

UNITED SECURITY L. I. & TRUST CO.
vs.
JOHN J. CUDMORE ET AL. } Equity. No. 19177.

I hereby waive issue of service and citation in the above-entitled cause.

CLARENCE R. WILSON,
Attorney for Complainant.

Instructions to Clerk in Preparing Record.

Filed May 16, 1900.

In the Supreme Court of the District of Columbia.

UNITED SECURITY LIFE INS. & TRUST CO.
vs.
NAT. BANK OF THE REPUBLIC. } Equity. No. 19177.

To the clerk:

Please make up the record in this cause, including the following papers therein:

First. Original bill.
Second. Exhibit No. 3 to bill.
Third. " " 4 " "
Fourth. Exhibit No. 5 to bill.

124 Fifth. Answer Nat. Bank of Republic.
Sixth. Exhibit No. 2 to answer.
Seventh. " 4 "
Eighth. " 5 "
Ninth. " 6 "
Tenth. Answer of Dan'l B. Clarke.
Eleventh. Order granting leave to amend bill.
Twelfth. Answer of John B. Larner to amended bill.
Thirteenth. " Bank of Republic to "
Fourteenth. Decree referring cause to auditor.
Fifteenth. Replication to answers of Clarke & bank.
Sixteenth. " " of J. B. Larner.
Seventeenth. Copy of assignment (only) in case 954, as shown by Sec'y of Treas. Return filed Jan. 3d, 1900.
Eighteenth. Exhibit Copies of Records of Treas. Dep't. Exclude copies of powers of attorney in making copy, but include other documents except letter of Sec'y of Treas. & his certificate.
Nineteenth. Letter from 1st Compt'r, Nov. 27th, 1893.
Twentieth. " " Jan. 19th, 1894, to Bradley.
Twenty-first. Letter from 1st Compt., Jan. 19th, '94, to D. N. Morgan.
Twenty-second. Letter from Petty to Larner, June 20, '98.
Twenty-third. " " " Oct. 14, '98.
Twenty-fourth. Extract from Treasurer's book.
24½. Letter of auditor transmitting final voucher to Treasurer; statements & papers thereto attached.
Twenty-five. Auditor's report, including stipulations.

Testimony.

Omit testimony of Brice Moses, A. A. Tweedale.
125 26. Exceptions to auditor's report.
27. Decree.

NATH'L WILSON AND
CLARENCE R. WILSON,
Sol'c'r- for Compl't.
JOHN B. LARNER,
Sol. Def'd'ts.

126 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 127, inclusive, to be a true and correct transcript of the record, as per the instructions of counsel, herein filed, copy of which is made part hereof, in cause No. 19177, equity, wherein The United Security Life Insurance and Trust Company of Pennsylvania is complainant and John J. Cudmore *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24th day of May, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

127 Court of Appeals, District of Columbia.

THE NATIONAL BANK OF THE REPUBLIC and JOHN B. LARNER, Appellants,

vs.

THE UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY, Appellee.

Stipulation.

It is hereby stipulated as follows:

It appeared in proof before the auditor that John J. Cudmore was indebted to the National Bank of the Republic on November 20th, 1891, in the sum of $10,451.47, no portion of which has ever been paid.

That in the cases of other contracts, No. 954, 1170, and 1195, between Cudmore and the District said bank held powers of attorney from Cudmore to Clarke, president, under which it collected all proceeds of the contracts except the retains, the assignments of which were similar to the assignment under the contract No. 954 in the record.

That BRICE J. MOSES, who had been a clerk in the National Bank of the Republic, testified before the auditor, *inter alia*, as follows:

Q. Why was a different course pursued in respect to the power of attorney in the case of contract No. 1270 and the powers of attorney in the other contracts referred to? A. The assignment
128 in the case of the three contracts referred to, Nos. 1170, 954, and 1195, were assignments of a specific number of bonds in the custody of the Treasurer of the United States, assigning these bonds to the bank; the case with contract 1270 at the time the power of attorney—Nov. 21st, 1891—was filed, no settlement of contract 1270 had been made for the reason that Cudmore was then in default on his contract. The general power of attorney which appears to have been prepared on that date was prepared by the officers of the bank in connection with the officers of the District government.

Objected to by Mr. Wilson.

It was prepared at that particular time because the contractor was in default on his contract and also in view of the fact that the bank was to make the necessary repairs, those repairs that the bank made during the period of two years.

By Mr. WILSON:

Q. Who actually wrote the power of attorney that you speak of? A. I think the power of attorney was written by Mr. Bradley.

Q. And who subscribed it on the part of the District? A. I don't know.

Q. What personal knowledge have you of the fact that they participated in drawing this contract? A. The auditor, Mr. Petty, has since told me.

By Mr. MATTINGLY:

Q. Did you know that the officers of the District government were in consultation with the officers of the bank in regard to these contracts? A. Yes, sir.

By Mr. WILSON:

Q. How did you know? A. Mr. Bradley talked with me about the matter.

That the only amounts paid by the District or received by the bank after November 20, 1891, were $590.55, amount of repairs on said sewer done by the District, the check for which was en-
129 dorsed over to the District by Mr. Clarke, president, and the sum of $1,574.25 for repairs done by the bank itself during the ensuing two years.

WM. F. MATTINGLY,
Sol. for Appellants.
NATH'L WILSON AND
CLARENCE R. WILSON,
Sol'rs for Appellee.

[Endorsed:] No. 995. National Bank of the Republic and John B. Larner, appellants, *vs.* United Security Life Ins. & Trust Co. of Penna. Stipulation of counsel. Court of Appeals, District of Columbia. Filed May 28, 1900. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 995. The National Bank of the Republic *et al.*, appellants, *vs.* The United Security Life Insurance and Trust Company of Pa. Court of Appeals, District of Columbia. Filed May 26, 1900. Robert Willett, clerk.

Court of Appeals, District of Columbia.

APRIL TERM, 1900.

No. 995.

THE NATIONAL BANK OF THE REPUBLIC AND JOHN B. LARNER, APPELLANTS,

vs.

THE UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY, APPELLEE.

BRIEF FOR APPELLANTS.

WM. F. MATTINGLY,
JOHN B. LARNER,
Solicitors for Appellants.

LAW REPORTER PRINT.

Court of Appeals, District of Columbia.

APRIL TERM, 1900.

No. 995.

THE NATIONAL BANK OF THE REPUBLIC AND JOHN B. LARNER, APPELLANTS,

vs.

THE UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY, APPELLEE.

STATEMENT OF THE CASE.

John J. Cudmore, on August 14, 1890, entered into a contract, No. 1270, with the District of Columbia, for the construction of certain sewers.

The National Bank of the Republic was advancing money to Cudmore to enable him to carry out his contract, and on August 23, 1890, took a power of attorney from him to Dr. Clark, president of the bank, to collect and receive from the District all proceeds payable to him by the District for and on account of work done and to be done under contract No. 1270 (Rec., p. 17).

Subsequently, on November 20, 1891, Cudmore executed another power of attorney to Dr. Clark, president, reciting his indebtedness to the bank in the sum of $10,450.47 for moneys advanced by the bank for the purpose of carrying out his contract, constituting him his lawful atttorney irrevocable to collect and receive from the District—

> "all sums of money, bonds or other valuables, which are due, or may become due, owing or payable to me from the District of Columbia for and on account

> of work done and to be done under the provisions of contract numbered 1270 for laying 12, 15, 18 and 21-inch sewer pipes on various streets in the District of Columbia, and for and on account of any other or extra work done by me for the District of Columbia aside from, in addition to, and independent of the said contract number 1270. . . . And for the purposes aforesaid I do hereby grant unto my said attorney full power and authority *irrevocable being coupled with an interest,* to do and perform," etc. (Rec., p. 7).

Under the law the Commissioners withheld 10 per cent. of the amount payable under contract No. 1270, viz., $2,920.64, as a guarantee fund to keep the work upon these sewers in repair for five years; and on June 22, 1893, they sent the amount to the Treasurer of the United States as Commissioner of the Sinking Fund of the District of Columbia.

On September 6, 1894, Cudmore executed a paper assigning to the plaintiff all his interest in this retain of $2,920.64 and authorized it to receive from the proper authorities of the United States or the District of Columbia said sum or the bonds in which it may be invested (Rec., p. 5).

BILL OF COMPLAINT.

On March 24, 1898, appellee filed its bill, in which it set forth that it had purchased this retain from Cudmore in September, 1894, his assignment to it, the deposit of said assignment with the Treasurer of the United States, and his acknowledgment of the receipt of the assignment under date of September 8, 1894.

That on September 19, 1894, it first learned that the power of attorney to Daniel B. Clarke of November 20, 1891, to secure an indebtedness to the National Bank of the Republic was filed and was then on file in the office of the Comptroller

of the Treasury, but that at the time and before complainant purchased said retain, no assignment or transfer thereof, or power of attorney relating thereto, appeared upon the records of the office of said Comptroller, and that at the time it purchased said retain, said power of attorney was not on file in the office of the Commissioner of the Sinking Fund, nor did any reference thereto appear on the books of said commissioner.

That the Commissioner of the Sinking Fund received, recognized and recorded the assignment to the complainant.

That said power of attorney does not assign to said Clarke the interest of Cudmore in and to said retain, nor does it authorize said Clarke to collect or receive said retain, but relates solely and exclusively to those moneys which were payable to Cudmore for work done and to be done under contract 1270 and was not intended to apply to said retain.

That Cudmore is insolvent.

That having purchased said retain in good faith without any notice of any claim on the part of said bank, and said bank having failed to file said power of attorney, was guilty of *laches* in the premises, the equity of complainant is superior to that of the bank.

ANSWERS OF CLARKE AND THE BANK.

These answers state that the bank advanced money to Cudmore to enable him to carry out contract No. 1270, the giving of the power of attorney of August 23, 1890, filed with the Commissioners of the District on August 28, 1890, and on the same day transmitted by them to the Comptroller of the Treasury.

That afterwards it was found that Cudmore was indebted to the bank in an amount much larger than would be derived from the proceeds of contract 1270, whereupon the

power of attorney of November 20, 1891, was given by Cudmore to the bank to include not only the entire proceeds of contract 1270, but all other sums due Cudmore by the District by reason of any other contracts. That this second power of attorney was filed with the Commissioners of the District on November 24, 1891, and was transmitted by them to the Comptroller of the Treasury on September 23, 1893.

That after said first power of attorney all payments under contract 1270 were made to the bank through its president and such payments continued until the entire amount due under said contract had been paid, except the amount of said retain, $2,920.64, which was transmitted to the Treasurer of the United States on June 19, 1893.

That on November 21, 1893, Charles S. Bradley, cashier of the bank, wrote to the Comptroller of the Treasury asking whether said power of attorney of November 20, 1891, was on file in his office, and under date of November 27, 1893 received a reply that it was properly on file in his office.

That on January 15, 1894 said cashier wrote requesting the Comptroller to transmit a copy of said second power of attorney to the Treasurer of the United States, and that under date of January 19, 1894 the Comptroller advised said cashier that a copy of said power of attorney of November 20, 1891 had been transmitted to the Treasurer of the United States, in whose custody it still is.

All the equities of the bill were specifically denied.

AMENDMENT OF BILL.

June 14, 1898, complainant amended its bill by charging that the bank, being in liquidation, some time in 1897 had sold; assigned and transferred all its interest in said retain to John B. Larner, and made him a party defendant to the bill.

ANSWERS TO AMENDED BILL.

The bank and Larner answered the amendment of the bill by admitting that Larner purchased the interest of the bank under said powers of attorney, but stating that no written assignment to him had been made.

By agreement of the parties, under a consent order, said sum of $2,920.64 was paid by the Treasurer of the United States to Nathaniel Wilson and John B. Larner, out of which $250 was paid to Cudmore, and the remainder, $2,670.64, was deposited in bank, to await the final decree in this cause.

The cause was referred to the auditor, who reported (Rec., p. 27–33) that the fund, $2,202.28, after deducting costs, was payable to the complainant.

The bank and Larner filed exceptions to the auditor's report (Rec., p. 66), and upon hearing the court passed a decree (Rec., p. 67) affirming the auditor's report, and that the amount be paid over to the plaintiff. From this decree the bank and Larner appealed to this court.

ASSIGNMENT OF ERRORS.

The court below erred in—

1. Affirming the report of the auditor in respect of the disposal of said fund.

2. In decreeing that said fund was payable to the complainant.

3. In not sustaining each of the exceptions filed to said report.

4. In not decreeing that said fund was payable to either said bank or John B. Larner; and—

5. In not decreeing that said fund was payable to the defendant Larner.

ARGUMENT.

The Power of Attorney of November 20, 1891, was an Equitable Assignment of said Retain.

To constitute an equitable assignment no particular words are necessary. Any words in fact are sufficient which show an intention of transferring or appropriating the chose in action to or for the use of the assignee for valuable consideration.

Wh. & Tu. Lea. Ca. in Equity, *841.
Story's Equity, Sec. 1047.
1 A. & E. Enc. (2d Ed.), 1055.
101 U. S. 306, Ketchum *vs.* St. Louis.
17 How. 612, Judson *vs.* Corcoran.
165 U. S. 654, 664, Walker *vs.* Brown.
165 U. S. 634, Fourth Street Bank *vs.* Yardley.

In this latter case an inferred parol agreement that a check should be paid out of a particular fund was held to constitute an equitable assignment of the fund.

66 Fed. Rep. 113, Methven *vs.* Staten Island Co.

The opinion in this case states the familiar principle that when two assignments of a chose in action for valuable consideration are made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right, though the assignment to him is later in date than that to the other assignee.

The principle is thus stated in 1 Wall. 624, Spain *vs.* Hamilton's Administrator:

> "To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary. Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of

manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

A power of attorney for a consideration in the case of an ordinary chose in action is irrevocable and consequently acts as an assignment.

2 Am. & Eng. Encyc. L. (2d Ed.) 1067, 1075.

Independent of the power of attorney of November 20, 1891 being an equitable assignment, the same principles of law apply, if it is to be considered merely as intended as security to the bank.

The bill in this cause avers that it was given for the purpose of securing an indebtedness to the National Bank of the Republic.

If for the purpose of security and the property or fund is identified, it is immaterial what form it may take or what the parties may call it. And equity will enforce it against the original contractor, his representatives, voluntary assignees and purchasers, or enbumbrancers, with notice, actual or constructive.

Pom. Eq., Secs. 1235, 1237.

5 App. D. C., 338, Woarms *vs.* Hammond.

The auditor in his report (Rec., p. 31), holds that the power of attorney of November 20, 1891, could not be held

to include the retain, because, first that the rules and practice of the office of the Treasurer as Commissioner of the Sinking Fund require distinct specific assignments of the retain held by that office; and second, that these rules and practice were well known to the bank and Clarke's attorney and to Cudmore, and had been followed by them in every other case appearing here except contract No. 1270. He finds that such were the rules and practice of the office of the Treasurer of the United States solely from the testimony of Barrett, a clerk in the Treasurer's office; that this power of attorney was not entered in his record book and because, in a conference between the Treasurer and himself, their conclusion was that the document was not such an one as they could act upon; and that there never had been a power like it filed in that office. He finds that these alleged rules and practice were well known to the bank and Clarke, because in three prior cases Cudmore made separate assignments to the bank of retains on contracts for which the bank held powers of attorney; and that the evidence as to these prior assignments may be relevant also as tending to show the intention of the parties to the power of attorney, that it was not intended to include the retain.

The auditor further holds that if this power of attorney were held to include the retain—

> "the important question of notice would remain, and on this point I am compelled to find that the deposit of the copy of the power of attorney in the office of the Commissioner of the Sinking Fund was not sufficient."

We will consider these findings of the auditor separately.

First. Did the testimony before him show the existence of any such rules and practice?

Second. Was the proof sufficient to show that such alleged rules and practices were well known to the bank and Clarke?

Third. Was the evidence of the three prior assignments admissible to prove the intention of the parties to the power

of attorney; that it was not intended to include the retain; and even if admissible, did the evidence, under the circumstances of this case, prove any such thing?

Fourth. Did the bank do all that was, under the law, incumbent upon it to do, in order to preserve its rights as equitable assignee under said power of attorney.

I.

As to the testimony before the auditor relied upon by him, as showing the alleged rules and practice of the office of the Treasurer.

Barrett (Rec., p. 39) testified that a copy of the power of attorney, of November 20, 1891, was sent by the Comptroller in a letter dated January 19, 1894, to the Treasurer and received by him on January 20, 1894, and was filed among the papers relating to Cudmore's contract. All papers that embody a power of attorney to pay interest to anyone are recorded in a place provided for them in the Register, "in order that we might send the interest checks to the proper parties." This power of attorney was not entered on the Register because it was considered a paper that we could not act upon in any way. It had no reference in its body to the retention at all, and there was no power of attorney to pay interest on the bonds in which the retention might be invested. It was submitted by me either to the Treasurer or Assistant Treasurer who was acting, and he decided that it could not be acted upon, and was simply filed away with the papers.

The money, $2,920.64, was held, uninvested, because the Treasurer, in view of all the complications likely to occur, concluded it better not to invest it—thought it better not to complicate the matter any more, as he could not decide upon conflicting claims (Rec., p. 40).

On cross-examination, the witness stated (Rec., p. 41), that he read the power of attorney—either read it to the

Treasurer of the United States or he read it himself; and that each of them had full knowledge of its contents.

On September 6, 1894, the power of attorney to the Life Insurance & Trust Co. was filed; I took it to the Treasurer and laid the whole matter before him. I did not tell him about the other power of attorney being on file; I did not recollect it. I did not carry the matter to the Treasurer until I was informed by Mr. Bradley that the bank would claim under the first power of attorney. This was probably two or three days after the assignment to the Insurance & Trust Co. I took all the papers to the Treasurer, and it was concluded not to invest it because of the two powers of attorney. It would complicate the matter more, and would likely cause litigation.

The foregoing is a practical summary of the evidence before the auditor, upon which he relies, as establishing what he finds to be the rules and practice of the office of the Treasurer of the United States as Commissioner of the Sinking Fund.

We submit that it does not establish anything of the kind. It simply shows that Mr. Barrett, the clerk in charge, for his own convenience, or that of his office, adopted what he calls a "register," in which were entered all papers that embody a power of attorney to pay interest to anyone in order that he might send the interest checks to the proper parties. And he didn't enter this power of attorney of November 20, 1891, in his register, because, in his opinion—

> "it had no reference in its body to the retention at all, and there was no power of attorney to pay interest on the bonds in which the retention might be invested."

Because he was mistaken in his legal opinion, and no paper like it had ever been filed there before, he simply filed it among the papers in the case and forgot all about it.

And this sort of evidence is solemnly relied on as estab-

lishing rules and practice of the office, to which well recognized legal rights are to be sacrificed.

That this power of attorney was considered by the Comptroller's office to include the retain is manifest from the letter of the acting Comptroller to the cashier of the bank, dated November 27, 1893, in which he states that it is properly on file in his office, and says:

> "If said power of attorney *pertained only to the ten per cent. retain*, it would properly be filed with the Treasurer of the U. S.;"

whereupon the cashier requested him to send a copy of it to the Treasurer, which he did under date of January 19, 1894 (Rec., p. 63).

II.

Was the proof sufficient to show that such alleged rules and practice were well known to the bank and Clarke?

The proof simply was that in three prior cases of contracts of Cudmore with the District, in which the bank held powers of attorney to receive the money from the District, it took special assignments of the retains. A sample of such assignments is given in case of contract No. 954 in the Record at page 26, from which it is manifest that the retain was already in the Treasurer's office and had been invested in bonds. Such proof standing by itself would simply be evidence that Clarke and the bank knew that such papers would accomplish what on their face they were intended to accomplish, but we submit that they would not be proof that there was any rule or practice of the office that a paper differently expressed but having the same legal effect would not be equally effective. Particularly in this case when it was in evidence that the cashier of the bank had, eight months before the assignment to the plaintiff, requested the Comptroller to send a copy of the power of attorney to the

Treasurer, which request was complied with. What follows under heading III should properly be considered in connection with the foregoing.

III.

Was the evidence of the three prior assignments admissible to prove the intention of the parties to the power of attorney, that it was not intended to include the retain; and even if admissible, did the evidence, under the circumstances of this case, prove any such thing?

We submit that when the legal construction of a paper is plain on its face, that other papers executed between the same parties, under a different state of facts, are not evidence to show an intent different from what appears on the face of the paper. So plain a proposition as this ought not to need argument to support it. The question in all such cases is, what intention has been expressed on the face of the paper? If that is clear, then no evidence is admissible to show that they intended something different. But even if by any possibility those three previous assignments could be held admissible for the purpose of showing that the paper of November 20, 1891, was not intended to include the retain, could they be by any possibility held as conclusive evidence of such intention in face of the other proofs in this cause?

In the cases of the three previous assignments, the final measurements had been made, no further work or repairs had been required, the 10 per cent. retains had been transmitted to the Treasurer and had been invested in bonds. In the case of this contract, No. 1270, the final measurement was not made until February 11, 1893 (Rec., p. 65).

On November 20, 1891, the date of the power of attorney, no settlement of the contract had been made, because Cudmore was in default on his contract. The bank agreed

to make the necessary repairs, which it did during the succeeding two years at an expense to it of $1,574.25 (Rec., p. 70). In addition to this amount the District had expended $590.55 on the sewers, a check for which amount was on July 6, 1893 (Rec., p. 18), given by the District to Clarke and endorsed by him back to the District. If said power of attorney was not understood as and intended to include the retain, why should the bank have expended over $1,500 in making repairs during the two years following? Why should the bank's cashier, in January, 1894, have seen to it that a copy was filed with the Treasurer of the United States? Why should it have agreed to make the repairs? Why should the District have agreed, in consideration of their having done all this work, not to make any claim thereafter upon the retain? (Rec., p. 48.)

IV.

Did the bank do all that was, under the law, incumbent upon it to do, in order to preserve its rights as equitable assignee under said power of attorney?

The bank, having this equitable lien or assignment, was, under the law, in order to retain its rights as against all other parties, simply required to give notice to the debtor. No other duty was imposed upon it. Did it perform this duty? The debtor was the District of Columbia; that it was notified there is and can be no question. See the letter of Auditor D. C. (Rec. pp. 64, 65). After the deposit of the retain with the United States Treasurer, the District still remained the debtor and the United States Treasurer was simply the trustee or agent of the District in respect of the fund. That this is so is manifest from the circumstances of the case and from the certified copy in evidence of the final voucher for the retain on file in the office of the United States Treasurer, showing (Rec., p. 65):

"DISTRICT OF COLUMBIA

"*To J. J. Cudmore, Dr.*"

amount retained under contract No. 1270.....$2,920.64

The bank, as we have seen, was careful to notify the United States Treasurer after the retain had been transmitted to him, so that not only the District, but its trustee or agent holding the fund, was notified.

In all cases of equitable assignments, when the debtor or his trustee or agent having custody of the fund assigned, is notified of the assignment by the assignee, we submit that his rights as such are fixed, and it makes no difference so far as his rights are concerned as against a subsequent assignee, that the debtor, or his trustee or agent forgot the fact of notice or misconstrued the legal effect of the assignment, particularly when an examination of the papers on file, as in this case, in either of the offices would have disclosed the assignment.

V.

What care or diligence, if any, did the plaintiff exercise to ascertain whether any previous assignment had been made before purchasing this retain?

The purchase was made by one E. Quincy Smith, of the firm of F. H. Smith & Son (Rec., p. 47). The only inquiries in respect of the matter were made by said E. Quincy Smith. If he was not the agent of the plaintiff then it purchased without making any inquiries whatever. Smith himself, as a witness for the plaintiff, testified (Rec., p. 48), that he went to Barrett, who looked at the register, and told him there was no assignment on file, and that he could see there was no assignment in the assignment column; but that Barrett told him "that if he were in my place, he would make a further investigation at the District office." Thereupon he went to the District office; saw Mr. Petty, the auditor, who referred him to Mr. Donovan, "who has those things directly in charge." He then saw Donovan, and without requesting him to look at the records or files of the

office, contented himself with the peculiar conversation he had with Donovan, and made the purchase (Rec., p. 48).

Smith would not admit that he or his firm was the agent of the plaintiff; but stated in response to the direct question that "we represented ourselves for the commission in it."

VI.

Even under the acts relating to the recording of deeds requiring deeds to be recorded, when the grantee has left the deed for record he is not responsible for the failure of the recorder to record or index the deed, having done all that the law requires him to do.

20 Am. & Eng. Encyc. L. 563. *Indexing.* If the law does not provide for keeping, an omission to index will not affect the validity of the record, although it may be the usage of the recording officer to index all instruments which are transcribed upon the record books, and even when the statutes require the recorder to make a general index, the authorities are to the same effect.

20 Am. & Eng. Encyc. L. 572. When the recorder neglects to record, the authorities are conflicting; but the weight seems to be in favor of the grantee, as he has done, in leaving the deed for record, all that the law requires him to do.

It is respectfully submitted that the decree below should be reversed, and the fund decreed to be paid to the defendant Larner.

WM. F. MATTINGLY,
JOHN B. LARNER,
Solicitors for Appellants.

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1900.

The National Bank of the Republic and John B. Larner, Appellants,

vs.

The United Security Life Insurance and Trust Co. of Pennsylvania, Appellee.

No. 995.

BRIEF FOR THE APPELLEE.

NATHL. WILSON,
CLARENCE R. WILSON,
of Counsel for Appellee.

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1900.

THE NATIONAL BANK OF THE REPUBLIC AND JOHN B. LARNER, Appellants,

vs.

THE UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY OF PENNSYLVANIA, Appellee.

No. 995.

Statement of Question.

The determining question raised in this appeal is whether the Power of Attorney dated November 20, 1891, given by John J. Cudmore to the National Bank of the Republic, to collect money due him from the District of Columbia under contract No. 1270 (see Addition to Record), constituted such an assignment of the "retain" of that contract, as should, in equity, have priority over the subsequent *bona-fide* assignment of the same "retain" by Cudmore to the complainant company, appellee herein (Rec., p. 5), without notice of the prior alleged assignment.

The retain, as is explained in the brief of the appellants, was a fund equal to ten per cent. of the total amount due Cudmore under his contract No. 1270 with the District of Columbia, withheld for a period of five years for the purpose of paying for possible repairs to the work done by Cudmore. This fund on June 22, 1893, was transmitted by the Commissioners to the Treasurer of the United States, whose duty it was as Commissioner of the Sinking Fund of the District of Columbia to hold it, on request to invest it in bonds, and at maturity to pay it over to the party entitled.

The Auditor, on reference, determined that this fund was not assigned by Cudmore to the National Bank of the Republic by the Power of Attorney dated November 20, 1891, given by Cudmore to the Bank; and that even if said Power of Attorney could have been considered an assignment of the fund in question no sufficient notice was given to the debtor, or custodian of the funds, the Treasurer of the United States; therefore the Auditor found that the alleged assignment to the Bank should not have priority over the subsequent *bona-fide* assignment to the United Security Life Insurance and Trust Company, complainant herein, and that said fund was payable to the complainant.

The Court below affirmed the findings of the Auditor in every particular, and from the decree so affirming the Auditor's Report appellants appeal.

Without adverting to the breadth and vagueness of the assignments of error, we will address ourselves to the points in dispute.

I.

The rule of law governing the fundamental point in this case is accurately stated in the brief of the appellants, at page 6.

The same rule is perhaps more fully stated by Pomeroy (3 Eq. Juris., § 1235), as follows:

> "The doctrine (of equitable assignment) may be stated, in the most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, *therein described or identified*, a security for a debt or other obligation, or whereby the party promises to convey or assign, or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrances with notice. * * * In order, however, that a lien may arise in pursuance of this doctrine, the *agreement must deal with some particular property, either by identifying it or so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation.*"
>
> Pomeroy Eq. Jur., Sec. 1235; see also section 1280.

Again, at Section 1280, the same learned writer states the familiar principle as follows, speaking of equitable assignment of funds:

> "What shall amount to the present appropriation which constitutes an equitable assignment *is a ques-*

tion of intention to be gathered from all the language, construed in the light of the surrounding circumstances."

In the application of this rule of law to the present case, appellants admit that the Power of Attorney in question is a mere *constructive* assignment of the fund, that it was not an assignment unless there were present all the elements that go to make up an equitable assignment. Hence, in the determination of this question we must look not only to the language of the instrument itself, but to the situation of the parties at the time it was made, to their course of dealing with each other, and to all the surrounding circumstances, for the purpose of determining, chiefly, what was the intention of the parties.

Gerrish *vs.* Sweetser, 4 Pick., 374.

Moore *vs.* Lowrey, 25 Iowa, 336.

Foster *vs.* Trenary, 65 Iowa, 620.

In Moore *vs.* Lowrey (*supra*), in which the question was as to whether a draft on a debtor constituted an assignment, the Court laid down the principle that no particular form is necessary to constitute an assignment, and says: "Neither is it necessary that the intent and the contract of the parties fully appear in the writing, but they may be otherwise shown."

In this view of the case, of course, the contention of the appellants (Brief, pp. 12–13), that the three prior assignments of similar retains given by Cudmore to the Bank were not admissible as evidence to show a course of dealing between the parties, falls to the ground. For, in determining the question as to whether the Power of

Attorney given by Cudmore to the Bank was an equitable assignment, it is not only proper, but necessary, to examine all the surrounding circumstances to determine the intent of the parties.

When this transaction is looked at in the light of all the surrounding circumstances, it becomes apparent that—

It was not the intention of the parties to the Power of Attorney, dated November 21, 1891, given by Cudmore to the Bank, that said Power should operate as an assignment of this retain.

1. That such was not the intention of Cudmore need hardly be pointed out. The fact that he made a second assignment of the same fund, considered in connection with his testimony on this point (Rec., p. 60), is conclusive as to what his idea as to the scope of the Power of Attorney really was.

2. The circumstances surrounding the giving of the Power of Attorney in question, shows clearly that *it was not the intention of the Bank, at the time of taking this Power of Attorney, that it should operate as an assignment of the "retain."*

(*a*) The course of dealing between the parties, or their own construction of instruments, used on former similar occasions to effectuate like results, constitutes the most enlightening evidence on this question. As pointed out by the Auditor (Rec., p. 30), Cudmore had had three previous contracts with the District of Columbia. In

all three cases the moneys payable to Cudmore, during the continuance of work on the contract, were paid to Dr. Clarke, President of the National Bank of the Republic, under Powers of Attorney similar to that given by Cudmore to the Bank in August, 1890, at the beginning of contract No. 1270. Under these Powers of Attorney in these three cases, the Bank collected all the moneys payable to Cudmore, *except the retains.* When the Bank wished to obtain possession of the retains in those three cases, it did not seek to extend the construction of its Power of Attorney; it did not seek to enlarge its Power of Attorney so as to make it "irrevocable and coupled with an interest;" instead of resorting to the uncertain construction of a vague instrument, as it seeks to do in this case, in those three prior cases, when dealing with the retains, it took a specific, certain, and formal assignment, closely similar to the assignment to the complainant company in this case, in which the retain was set forth and identified.

It is, then, incumbent upon the Bank to show why, in this one instance, it varied its usual course of dealing and adopted the plan of taking an irrevocable power of attorney to accomplish the same result—the taking an assignment of the retain—that on three previous occasions had been brought about without difficulty by taking a formal assignment. It is no answer to say, as the appellants contend, that the circumstances surrounding the taking of the Power of Attorney in this case were different from those surrounding the assignments of retains in previous cases, in that, in those prior cases when

the assignment was taken the retain had been set aside, whereas in this case at the time of taking the Power of Attorney the contract had not been completed nor the retain set aside; for by the appellants' own showing no moneys were payable under contract No. 1270 to Cudmore or his attorney after November 21, 1891, the date of the Power of Attorney, except this retain; if, then, this Power of Attorney had for its object the assignment of this retain, what difference would it have made whether that assignment was by power of attorney or by an instrument of actual assignment? The fact that the retain had not been set aside does not add to the propriety of the Power of Attorney nor detract from that of an actual assignment.

Nor does the testimony of Brice J. Moses, a witness for the defendants, contained in a stipulation of counsel (Rec., p. 70) throw any light on this point. His testimony was as follows:

> "Q. Why was a different course pursued in respect of the Power of Attorney in the case of contract No. 1270, and the powers of attorney in the other contracts referred to?
>
> A. The assignment in the case of the three contracts referred to, Nos. 1170, 954, and 1195, were assignments of a specific number of bonds in the custody of the Treasurer of the United States, assigning these bonds to the Bank; the case with contract No. 1270 at the time the Power of Attorney—November 21, 1891—was filed, no settlement of contract No. 1270 had been made, for the reason that Cudmore was then in default on his contract." (Rec., p. 70.)

To rebut this testimony it is necessary only to read

the assignment of the retain in the case of contract No. 954, which, according to stipulation of counsel, was similar to the assignments of retains of contracts No. 1170 and 1195. That instrument shows by its own language that it was distinctly an assignment of the retain, and not, as stated by Moses, an assignment of the bonds in which the retain happened to be invested. (Rec., p. 70.)

(*b*) If, therefore, the Power of Attorney of November 21, 1891, was not for the purpose of assigning this retain to the Bank, as appellees earnestly contend, it is pertinent and necessary to ascertain what the real purpose and object of the power was, since it is only fair to presume that this power was intended to cover something that the previous power of attorney, that of August, 1890, given at the beginning of Cudmore's contract with the District of Columbia, did not include.

The explanation of the Bank is that the first Power of Attorney was revocable and not coupled with an interest, and could not be considered authority to the Bank to collect the retain in question. But this is hardly satisfactory, because the language used to describe the moneys and funds collectible and covered by the two instruments is identical in both. The Power of Attorney of August, 1890, recites that Daniel B. Clarke, President, is appointed attorney "to demand, ask, sue for, collect, receipt for, indorse my name, and receive *all sums of money, bonds, or other valuables which are due or may become due, owing, or payable to me* from the District of Columbia for and on account of work done and to be done under

the provisions of contract numbered 1270." * * * (Rec., p. 17.)

The Power of Attorney of November 21, 1891, recites that Daniel B. Clarke, President, is appointed attorney "to demand, ask, sue for, collect, receipt for, endorse my name and receive *all sums of money, bonds, or other valuables which are due or may become due, owing or payable to me* for and on account of work done or to be done," etc., etc.

If, therefore, the first Power of Attorney was not, and the second was, intended to cover this retain, it is certainly fair to presume that the second Power of Attorney would have contained some language showing the difference. We even go further, and say that the absence of broader language as to the funds covered in the second power than in the first is conclusive evidence that the second was not intended to cover more than the first.

The actual and creating purpose of the Power of Attorney of November 21, 1891, as recited in that instrument itself, was to give to the Bank, through Clarke, authority to collect moneys due Cudmore "*for and on account of any other or extra work done by me for the District of Columbia aside from, in addition to, and independent of the said contract numbered 1270.*" (Addition to Rec., p. 2.)

The fact that the second Power of Attorney gives to the Bank authority to collect moneys due Cudmore under *other* contracts than 1270, which the previous power had not done, and the fact that the language describing

the funds collectible under contract No. 1270 was no broader in the second instance than in the first, together with the further fact that the second power expressly confirmed and continued in force the first, certainly show most conclusively *that the sole purpose of the second power of attorney was merely to give the bank authority to collect from Cudmore moneys due him for work done under other contracts.*

That such was the purpose of the second power of attorney is further borne out by the answers of the Bank, and of Daniel B. Clark, and they should now be estopped to deny it.

The answer of Daniel B. Clarke recites:

> "After the execution of said power (referring to the power of attorney of August, 1890), it was found that the said Cudmore was indebted to the National Bank of the Republic in a sum much larger than would be derived from said contract No. 1270, and said Cudmore agreed that the said Bank should have authority to collect from the District of Columbia any and all sums of money that might become due and owing to him, the said Cudmore, by virtue of other contracts which he, the said Cudmore, had with the District of Columbia, *and accordingly, on the 20th day of November, 1891, after the completion of the work under said contract No. 1270, and before all the moneys due thereunder had been paid, the said Cudmore executed to this defendant, as president of the National Bank of the Republic, a further power of attorney.*" * * * (Rec., p. 8.)

The language of the answer of the National Bank of the Republic, is similar and to the same effect. (Rec., p. 11.)

We submit, therefore, that the very terms of the Power of Attorney in question, and the express explanation of the purpose of that instrument by the defendants themselves, show beyond all shadow of doubt that the purpose which called this Power of Attorney of November 21, 1891, into being, was not to secure an assignment of this retain, as contended by the appellants, *but was to secure to the Bank the payment of moneys due Cudmore under contracts other than No. 1270.*

And in construing this Power of Attorney here in dispute, and in determining whether it was the intent of the parties that it should operate as an assignment of the retain, it is interesting to note the language of the Supreme Court, per Nelson, J., in a somewhat similar case, in which the question was whether a writing was intended as a naked authority to collect and control certain judgments, or as an assignment of the creditor's interest therein. The Court, holding the writing not to be an assignment, said, at page 580 :

> *" If a transfer of the interest had been contemplated, as the instrument was drawn for the purpose of carrying into effect the agreement and understanding of the parties, it is surprising that words importing an assignment are altogether omitted, and those importing only an authority over the list of judgments used. It would have been most natural to have drawn an assignment in terms."*
>
> Rogers *vs.* Lindsey, 13 How., 441.
>
> See also People *vs.* 3d National Bank, 59 N. E. Rep., 35.

II.

The Power of Attorney of Nov. 21, 1891, did not sufficiently identify the fund alleged to have been assigned, so as to operate as a valid equitable assignment thereof.

As we have seen (*supra*, p. 3), one of the elements of the rule as laid down by Pomeroy to be followed in determining what is an equitable assignment, is that the fund assigned must be specifically described or sufficiently identified.

Pomeroy Eq. Juris., Sections 1235, 1280.

The obvious meaning of this rule is that the instrument purporting to be an assignment must be so definite and clear as to the fund assigned that the debtor or person having custody of the fund shall know beyond all peradventure of a doubt to whom the fund in his control is properly payable.

As said by Mr. Justice Swayne, in Christmas *vs.* Russell, at p. 84, in determining whether a certain promise to pay out of a fund constituted an assignment: "The transfer must be of such a character that the fundholder can safely pay and is compellable to do so, though forbidden by the assignor."

Christmas *vs.* Russell, 14 Wall., 70.

See also Nat. Bank *vs.* Portland, 60 Pac. Rep., 563.

Any other kind of an assignment than one specifically setting forth and describing the fund assigned is termed a blind assignment, and was properly condemned by the

Supreme Court, per Wayne, J., in the leading case of Spain *vs.* Hamilton's Admr. (1 Wall., 604, 623), as follows:

> "No creditor has a right to take a blind assignment from his debtor upon the latter's anticipation of becoming interested in a particular fund to be realized thereafter, without making such inquiries as the occasion may require, and then to ask in equity for a priority in the payment of his debt merely for the precedence in date of his assignment over those who became subsequently assignees for part of the same fund for actual value given to the *cestui que trust* of the fund."

Now the language of the Power of Attorney of November 21, 1891, purporting to specifically assign this retain in the hands of the Treasurer of the United States does not mention the retain, as such, but broadly assigns all "sums of money, bonds, or other valuables" due to Cudmore under contract No. 1270. This, as pointed out above is the identical language used in the previous Power of Attorney, which was not regarded by the Bank itself as sufficient to assign the retain.

Moreover, we submit, this retain had certain qualities which rendered it separate and distinct from moneys, bonds, or valuables payable generally to Cudmore; for although in fact it was money due to Cudmore from the District of Columbia, yet being withheld for a long period of time, in the hands of a person holding that retain and nothing else pertaining to this contract of Cudmore's, whose duty it was to invest it, and to pay it, and it alone, to the person properly entitled, it was in a very different status from that of the moneys payable directly by the officers of the District of Columbia as the work was being done under the contract.

That a retain such as this is a fund separate and distinct from the money payable generally under the contract while the work under the contract is being performed, see Adler *v.* Ry. Co., 92 Mo. 242.

In that case a contractor had a contract with the defendant railroad company to build or reconstruct portions of the road, according to the terms of which he was to be paid in monthly instalments, 15 per cent. of each monthly payment to be *retained*, and not paid until ninety days after the completion of the work. This *retain* the contractor assigned to the complainant, of which the railroad company was notified.

There was some question (not material in this case) as to whether the defendant railroad company was properly chargeable with this debt, but it also relied upon the doctrine that a part only of an entire demand cannot be assigned without the consent of the debtor, contending that the retain was only an indistinguishable part of the whole amount due under the contract, precisely as claimed by the defendant in this case.

But the Court held that " there can be no question as to the fact that within ninety days after the completion of the contract, in the event of the non-payment of the retained percentage, an action would be maintainable for its recovery, as a separate and distinct debt or demand. *It is this separate demand as an integer, which is the subject of the assignment, and hence the rule invoked by counsel has no application.*"

The effect of the failure of the Power of Attorney in question to specifically describe and identify the retain

affords an excellent illustration of the working of the rule governing this case; for it was the failure of that instrument to mention the retain or in any way to describe it, which led Barret, the clerk in the Treasurer's Office having these retains in charge, after a consultation with the Treasurer himself, to conclude that this Power of Attorney did not assign or in any way affect the retain in his custody.

Without going into Barret's testimony in detail, it is sufficient to say that he has had charge of the "sinking fund" of the District of Columbia and of "retains" for ten years; and that when, on the 6th of September, 1894, the Power of Attorney in question was filed with him, he carefully read it, considered its effect, sought the advice of the Treasurer, and then came to the conclusion that it did not affect the retain of contract No. 1270. It was his custom, well known to the Bank and its agents, as is evidenced by the record of the assignments of three previous retains to the Bank, to keep a record book, in which were registered all assignments of retains. (Rec., pp. 38–41.)

It is argued by appellants that the purpose of this book was merely to enable the clerk having charge of retains to know to whom the interest on the bonds in which retains were invested was payable, and not for the purpose of giving notice of assignments of retains. But, according to Barret's own statement, the Power of Attorney was not recorded, not because the retain was not invested in bonds, but because it contained no reference to the retain. (Rec., pp. 39 and 40.)

Further, it is a fact of the utmost significance on this point that the assignment by Cudmore to the complainant assigning the retain specifically, was without question immediately recorded by Barret in his book, *although the retain was not invested in bonds* (Rec., pp., 39, 40). In view of this fact, it cannot be said, as argued by the appellant, that record was kept of assignments only when the retain was invested in bonds.

The fact remains, therefore, that *owing to the failure of the Power of Attorney to specifically describe and identify the fund alleged to be assigned, the person having custody of the fund was not given sufficient notice that the fund had been assigned.* Hence the Power of Attorney in question fails in its functions as a complete equitable assignment. And it is no answer to say merely that the person having custody of the fund was "mistaken in his legal opinion" as to the effect of the instrument, because, as shown above, the instrument in question constituted an assignment, not on its face, but only when read in the light of all the surrounding circumstances; and Barret had no opportunity to inquire into the circumstances surrounding the making of the Power of Attorney, nor was he informed of them by the Bank.

III.

Equities of the parties as determined by their diligence or negligence in securing their rights.

(1) The defendant Bank, by way of filing its alleged

assignment of the retain in question with the proper officer, merely requested the Comptroller of the Treasury, in whose office the Power of Attorney of November 21, 1891 was lodged, to forward it to the Treasurer of the United States. This was done on the 15th of January, 1894.

Dfdts. Exhibit No. 6, Rec., p. 63.
Complt's Exhibit No. 4, Rec., p. 62.

On the 6th of September, 1894, the assignment to the complainant was filed (Rec., p. 39).

During that period of eight months, from January to September, 1894, the Bank made no effort to see that its Power of Attorney was duly recorded or that Barret understood the alleged nature of the paper. It was content to let this dubious paper come into Barret's hands from the Comptroller without a word of explanation, and to let it lie in his office—without taking the very slight trouble of even writing to find out whether it was properly recorded or whether Barret knew the nature of its contents—for a period of eight months and until Cudmore had made an assignment of the retain to the appellee, and until that assignment had in fact been filed with Mr. Barret. Then it was that Bradley, the cashier of the Bank, became anxious lest Barret fail to duly record the Power of Attorney, and went to the Treasurer's office to see that it was properly recorded and that Barret was aware of its nature. (Rec., pp. 54 and 58.)

It was Bradley's eight months' delay in seeing that Barret properly construed the Power of Attorney filed with him and that it was duly registered, that consti-

tuted the negligence of the appellants; and it is this negligence that made possible the second assignment of this retain by Cudmore to the appellee. Hence, the mere priority in time of the Power of the Attorney to the Bank cannot give it precedence over the subsequent assignment to the appellee made in good faith and (owing to the negligence of the prior assignee) without notice, and for a valuable consideration.

(2) The appellants charge that, in some vague way, the appellee was guilty of gross negligence in not ascertaining that there had been a previous assignment to the Bank of this retain. What they rely upon for this contention does not appear.

Smith, who acted as agent for the appellee in this transaction, testified that he had bought about a hundred of these retains at various times, and six or eight for the appellee; that he was familiar with the manner of their deposit in the Treasurer's Office and the registry there kept; that in this case, when Cudmore came to him and offered to sell this retain, he went directly to Barret's office and not only inquired whether this retain had been assigned, but himself looked at the record book and found no entry of an assignment. Then Barret, having told him that "it was doubtful wisdom to buy any sewer retains," Smith went to the office of the District Commissioners and inquired both of Mr. Petty, the Auditor of the District, and of Mr. Donovan, the clerk "who had these matters directly in charge," whether there was "anything wrong with Cudmore's retain." He was positively informed that not only was there no lien on the

retain, but that it had been agreed between the District and Cudmore not to make any further charges for repairs against the retain. (Rec., pp. 47–51.)

What inquiry or search further than this a diligent business man should make in a transaction of this sort is not made to appear; and it is submitted that the diligence of Smith in ascertaining possible claims against the retain is in strong contrast with the eight months' delay on Bradley's part in seeing that the Power of Attorney to the Bank, if considered by it as an assignment of the retain, was recorded by Barret.

IV.

Even if it be conceded that the Power of Attorney in question was a valid assignment of the retain, and that it was duly filed with Barret and that the failure to properly register it was due only to the negligence of Barret, then the question arises upon whom should the loss occasioned by the negligence of a recording officer fall—whether upon the first or second assignee of the same fund.

And it is submitted that, without going further into this question, the loss in such cases should fall upon him whose instrument was not recorded, by analogy to that rule of law which holds, according to the great weight of authority, that under the recording acts, where an instrument filed for record is not recorded owing to the negligence of the recording officer, and a subsequent purchaser of the same property is thereby misled, the

loss must fall upon him whose instrument was not duly recorded.

It is true that it is stated in 20 Am. and Eng. Encyc. Law, 572, that in such cases the weight of authority is in favor of the first grantee, but the authority chiefly therein relied on is Devlin on Deeds.

We submit that the following cases should be ample authority for settling this question in favor of him who was misled by the defective record in this jurisdiction, where this point has never, so far as we can ascertain, been directly adjudicated.

Frost *vs.* Beekman (1814), 1 John. Ch., 288.
Sawyer *vs.* Adams (1836), 8 Vt., 172.
Miller *vs.* Bradford, 12 Iowa, 14.
Barney *vs.* McCartney, 15 Iowa, 510.
Whalley *vs.* Small, 25 Iowa, 184.
Barnard *vs.* Campau, 29 Mich., 162.
Terrell *vs.* Andrew Co., 44 Mo., 309.
Bryden *vs.* Campbell, 40 Md., 388.
Lynch *vs.* Murphy, 161 U. S., 247.
Abraham *vs.* Mayer, 27 N. Y. Supp., 269.
Watkins *vs.* Wilhoit, 35 Pac. Rep., 646.
2 Pomeroy Eq. Jurisp., § 653, 654.
Webb, Rec. Titles, 516–518.

The principle of the above cases, as explained by Chancellor Kent in Frost *vs.* Beekman (*supra*) is that "The (subsequent) purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee; and if a mistake occurs to his prejudice, the

consequences of it lie between him and the clerk, and not between him and the *bona-fide* purchaser."

And in Lynch *vs.* Murphy (*supra*) the Supreme Court, by Mr. Justice White, in holding that recording a defective deed did not operate as constructive notice to subsequent *bona-fide* purchasers, followed the principle that the record is notice only of what it contains, and the loss in cases of negligence of the recording officer should fall upon the party whose instrument was defectively recorded. (Citing 3 Washburn Real Property, 592.)

So that although there is a distinction between the above class of cases and the present case, in that in the case at bar it was not by law the duty of Barret to keep a record of instruments affecting the retain, yet, when we consider the fixed and well-known custom of actually keeping such a record, the analogy is seen to be very close, and the principle that loss occasioned by the negligence of a recording officer should fall upon him whose instrument, although prior in time, was not recorded, and not upon him who was misled by a defective record.

Summary.

1. The Power of Attorney dated November 21, 1891, given by Cudmore to the Bank was, if an assignment of the retain in question, a *constructive* assignment, and therefore must be read in the light of all the surrounding circumstances to ascertain the intent of the parties.

2. When so read it becomes clear that it was not the

intent of the parties that this Power of Attorney should assign the retain in question.

(*a*) It clearly was not Cudmore's intention.

(*b*) It was not the intention of the Bank because—

(1) If it sought an assignment of the retain it would have taken such a definite assignment as it had taken in the previous cases.

(2) The actual intention of the Bank as evidenced by the Power of Attorney itself, and the answers of Clarke and of the Bank to the bill of complaint, was to secure to itself the payment of moneys due Cudmore under contracts other than No. 1270.

3. The Power of Attorney in question was not a valid equitable assignment, because it did not point out, define, or in any way identify the fund alleged to be assigned. The mere filing of it with Barret was not, therefore, sufficient notice to him that the fund had been assigned as claimed.

4. If we consider the respective diligence or negligence of the parties as determining their equities in the premises, the fact that Bradley delayed eight months after filing the Power of Attorney in question in ascertaining that it was properly on file and recorded, and the fact that Smith, agent of the complainant company, made every effort to find out whether there had been a previous assignment of this retain, or any lien or claim against it, are conclusive, because it was that very delay of Bradley that caused the loss sought to be imposed upon the complainant company.

5. If Barret be regarded as one whose duty it was to record the instruments filed with him affecting the retains in his custody, and if it be conceded that it was through his negligence alone that the Power of Attorney was not recorded, then by analogy to that rule of law, according to which the loss occasioned by the negligence of a recording officer must fall upon him whose instrument was not properly recorded, and not upon a subsequent purchaser or mortgagee of the same property who was misled by the defective record, the loss in this case must fall upon the appellants and not upon the appellee.

6. For these reasons the conclusion is inevitable that the Power of Attorney, although filed with the Treasurer of the United States before the assignment of the retain to the appellee, does not constitute such an assignment of the retain to the appellee as should in a court of equity be given priority over a subsequent *bona-fide* assignment for a valuable consideration and without notice.

It is submitted the decree of the Court below, ratifying and confirming the Auditor's Report, should be affirmed with costs.

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